2011

Tom Gregory v. Mark Shurteff : Plaintiff/ Appellant's Opening Brief

Utah Court of Appeals

IN THE UTAH SUPREME COURT

Tom Gregory, *et al.*, Plaintiffs/Appellants, vs. Mark Shurtleff, *et al.*, Defendants/Appellees.	Sup. Ct. Dkt. No. 20110277-SC

PLAINTIFFS'/APPELLANTS' OPENING BRIEF

APPEAL FROM RULE 12(b)(6) JUDGMENT OF DISMISSAL ENTERED BY THIRD JUDICIAL DISTRICT COURT, THE HONORABLE L. A. DEVER PRESIDING

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I. LIST OF PARTIES

The plaintiffs/appellants are: Tom Gregory, Glen E. Brown, A. Lamont Tyler, Marjorie Tuckett, Teresa Theurer, Jordan Tanner, Debbie Swenson, Carmen Snow, Marilyn Shields, Pat Rusk, Ronda Rose, Jack Redd, Georgia Peterson, Carole Peterson, Bonnie Palmer, Denis Morrill, Bill Moore, Sarah Meier, Rosalind McGee, Scott McCoy, Sheryl Allen, Dee Burningham, Kim Burningham, Carolyn White, Michael Jensen, Steven O. Laing, Judy Larson, Lisa Watts Baskin, David Hogue, Rebecca Chavez-Houck, Janice Fisher, Christine Johnson, Beth Beck, Mike Marsh, Karen Hale, Becky Edwards, Janet Cannon, and Steven C. Baugh.

The defendants/appellees are: Mark Shurtleff, in his official capacity as Attorney General for the state of Utah, Edward Alter, in his official capacity as Treasurer for the state of Utah, and Jeff Herring, in his official capacity as Executive Director of the Utah Department of Human Resource Management.

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IV. JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear and resolve this appeal pursuant to Utah Code, Section 78A-3-102(3)(j). The final order from which this appeal is taken was entered January 31, 2011. This was an order pursuant to Rule 54(b), Utah Rules of Civil Procedure, which certified as final a prior ruling of the lower court which dismissed two counts of plaintiffs'/appellants' (hereinafter simply "plaintiffs") complaint -- which ruling was made May 20, 2009. The notice of appeal from this January 31st final order was filed March 1, 2011.

V. STATEMENT OF ISSUES

The issue presented on this appeal is whether plaintiffs' complaint below stated legally sufficient claims, pursuant to Rule 12(b)(6), Utah Rules of Civil Procedure, that SB 2 2d Substitute (hereinafter simply "SB 2"), an omnibus education bill enacted in the 2008 general session of the Utah State Legislature, violated the so-called single subject and clear title provisions of Utah Constitution, Article VI, Section 22.

This is a question of law which is reviewed for correctness; no deference is given to the lower court's decision in this regard. *See, e.g., Wood v. University of Utah Medical Center,* 67 P.3d 436, 439 (Utah 2002).

The constitutionality of SB 2 was put at issue by plaintiffs' complaint which is in the record at R. 1-36. The legal sufficiency of the complaint was raised by defendants' motion to dismiss. R. 37-94. Plaintiffs resisted defendants' motion, R. 279-308, but the lower court overruled plaintiffs' arguments, R. 707-718. The

lower court certified its ruling as a final order pursuant to Rule 54(b), Utah Rules of Civil Procedure. R. 823-824. This appeal was taken from that finalized ruling. R. 938-940.

VI. IMPORTANT CONSTITUTIONAL PROVISION

The outcome of this appeal turns upon the interpretation of Utah Constitution, Article VI, Section 22. Article VI, Section 22, requires the Utah State Legislature to observe certain procedures in the enactment of bills into law. Article VI, Section 22, provides, in full, as follows: "Every bill shall be read by title three separate times in each house except in cases where two-thirds of the house where such bill is pending suspend this requirement. Except general appropriation bills and bills for the codification and general revision of laws, *no bill shall be passed containing more than one subject, which shall be clearly expressed in its title*. The vote upon the final passage of all bills shall be by yeas and nays and entered upon the respective journals of the house in which the vote occurs. *No bill or joint resolution shall be passed except with the assent of the majority of all members elected to each house of the Legislature*." (Emphasis supplied.)

VII. STATEMENT OF THE CASE

Plaintiffs are a combination of elected legislators, former legislators, elected officials, government servants, and good citizens who have a stake in ensuring that the process by which bills become law at the Utah State Legislature is fair and transparent. In 2008, the Legislature enacted SB 2, an omnibus

education bill. Plaintiffs believed that this enactment violated the so-called single subject and clear title provisions of Utah Constitution, Article VI, Section 22. They filed a complaint in the lower court, seeking declaratory and injunctive relief in that regard.

Plaintiffs' complaint is found in the record below at R. 1-36, and, for the convenience of the Court, is reproduced as Addendum A to this brief. The complaint, when fairly read as required by Rule 12(b)(6), Utah Rules of Civil Procedure, contains the allegations which are detailed below.

The Utah State Legislature passed SB 2 in its 2008 general session and that bill was signed by the Governor of the state of Utah and became law.

SB 2, as ultimately enacted, is so-called omnibus, "Christmas Tree" legislation. But it did not start as one bill at the beginning of the session. Rather, it originated as 14 pieces of proposed legislation which were introduced, reviewed, considered in committee, debated on the floor, and, in some instances, actually voted upon and defeated as separate bills.

These 14, separate bills were bundled, in the last hours of the legislative session, into one bill, SB 2. In this eleventh-hour bundling, SB 2 combined budgetary and appropriations measures with substantive law. It combined bills which had been voted down by an entire house or defeated in committee with other bills which, because of popularity or need, were sure to pass. It combined bills which bore no necessary or logical relation to each other, including measures which were keyed to administration by different departments of state government

and which were codified in or cross-referenced to various titles throughout the Utah Code.

Plaintiffs' complaint alleged that the purpose of the single subject requirement in Article VI, Section 22, is to prevent log-rolling. The complaint alleged that SB 2 was the product of log-rolling and therefore offensive to Article VI, Section 22, in three respects. First, SB 2 combined budget measures with substantive law. This not only entails two subjects within the meaning of the single subject rule, but also, and more important, such bundling uses the exigency of appropriations to leverage enactment of the minority-supported substantive measure. Second, SB 2 combined 14 bills, all of which had gone through the legislative process as separate measures, into one bill; 3 of the 14 bills actually had been defeated on the house floor or in committee hearings; however, these defeated bills, at the eleventh hour, were revived and bundled with the 11 other, more popular measures, thereby achieving a passage into law which, absent bundling, could not have occurred. Third, even if SB 2's enactment through log-rolling isn't obvious when analyzed under the two tests noted above, it is apparent when viewed under the lens of a third approach which often is employed in single subject jurisprudence. Even where bundled bills bear a surface similarity, they do not comprise a single subject within the meaning of provisions such as Article VI, Section 22, if they have no necessary or logical relation to each other. Whether a necessary or logical relation exists is determined by an examination of several

factors, all of which, in this case, point to the omnibus, rather than singular, character of SB 2.

Plaintiffs' complaint also alleged that SB 2 violated the clear title requirement of Article VI, Section 22, a mandate that is distinct and separate from the single subject rule. Plaintiffs' complaint alleged that SB 2's title, "Minimum School Program Budget Amendments" was misleading and lacked transparency for a number of reasons. The title was under-inclusive, contrary to our state's judicial construction of Article VI, Section 22. And it was misleading for several reasons, including, for example, that the reference to "budget program," hid the fact that the bill contained substantive measures which had been bundled with SB 2 in the final hours of the legislative session. The other reasons that the title was misleading are alleged in plaintiffs' complaint and discussed in the argument below.

Defendants moved to dismiss the first two counts of plaintiffs' complaint -- those which alleged violations under the single subject and clear title provisions of Article VI, Section 22 -- for failure to state a claim upon which relief may be granted under Rule 12(b)(6), Utah Rules of Civil Procedure. The lower court granted this motion,[1] then, later, certified that ruling as a final, appealable order. Plaintiffs thereafter brought this appeal.

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[1] In ruling that plaintiffs' complaint was legally insufficient, the lower court relied upon a decision from the United States District Court for the District of Utah, *TecServe v. Stoneware, Inc.*, 2:08-cv-144-TS (slip opinion) (D. Utah, August 4, 2008). For the convenience of the Court, the *TecServe* opinion is reproduced in

VIII. SUMMARY OF SINGLE SUBJECT ARGUMENT

Plaintiffs brought this civil action against defendants, alleging that SB 2, an omnibus education bill passed in the 2008 general session of the Utah State Legislature, was unlawfully enacted and, therefore, should be declared invalid under the so-called single subject and clear title provisos of Article VI, Section 22, of the Utah Constitution. Utah's jurisprudence in this regard holds that every application of Article VI, Section 22, is *sui generis,* dependent upon the particular legislation and peculiar facts involved in the case at hand. Prior precedents or other decisions are merely guides along this decision-making path. [2]

Addendum C to this brief. In setting forth the standard of review for motions under Rule 12(b)(6), Federal Rules of Civil Procedure, Judge Stewart, in *TecServe,* relied upon the recently revised federal standard announced by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly,* 550 U. S. 544 (2007). And, indeed, the lower court in our case, at pages 9 and 10 of its ruling (which is reproduced as Addendum B to this brief) quotes from and relies upon the language of *Twombly* as incorporated in the opinion in *TecServe.* With respect, plaintiffs believe that their complaint easily meets the more rigorous pleading requirements set forth under *Twombly's* new gloss on federal rule 12(b)(6). But of equal importance, this Court has not adopted *Twombly's* pleading rationale for purposes of the Utah Rules of Civil Procedure, and the Utah Supreme Court Advisory Committee on the Rules of Civil Procedure recently issued a report, "Proposed Rules Governing Civil Discovery," which, at pages 8-9, expressly recommends against the adoption in Utah of heightened pleading requirements such as those articulated in *Twombly* and its progeny at the federal level.

[2] *See, e.g., Baker v. Department of Registration,* 3 P.2d 1082, 1090 (Utah 1931) ("'. . . no hard and fast rule can be formulated which is applicable to all cases, but each must to a very large extent be determined in accordance with the peculiar circumstances and conditions thereof, and . . . the decisions of the courts are valuable merely as illustrations or guides in applying these general rules . . . '" [citation omitted]); *Utah State Fair Ass'n v. Green,* 249 P. 1016, 1025 (Utah 1926) (same); *State v. McCornish,* 201 P. 637, 639 (Utah 1921) (same); *State v. Edwards,* 95 P. 367, 368 (Utah 1908) (". . . no hard and fast rule can be formulated

Our case will be no exception to this rule. As indicated here and below (in the discussion of the clear title requirement of Article VI, Section 22), the issues raised on this appeal, in several respects, will be matters of first impression. For the first time in Utah history this Court will have to decide whether the bundling of bills with substantive law, budgetary amendments, and appropriations measures runs afoul of Article VI, Section 22. Similarly, although Utah's opinions speak of the anti-log-rolling purpose to be served by Article VI, Section 22, no case ever has involved facts where the actual occurrence of this parliamentary vice is apparent from the legislative record which courts permissibly may consider[3] – as opposed to opinions where courts endeavor to "decipher" or "de-code" a log-rolling violation from the face of a bill.

As noted above, when Article VI, Section 22, says that "no bill shall be passed containing more than one subject," this means that no bill shall be passed

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which is applicable to all cases, but each case must to a very large extent be determined in accordance with the peculiar circumstances and conditions thereof . . . the decisions of the courts are valuable merely as illustrations or guides in applying these general rules[ ]"); *Marioneaux v. Cutler,* 91 P. 355, 358 (1907) (". . . a hard and fast rule governing all cases cannot be formulated . . . no general rule on the subject can safely be formulated[ ]").

[3] Utah apparently adheres to a modified version of the so-called "enrolled bill doctrine," which permits courts to rely upon the legislative journals as evidence in determining whether a violation of Article VI, Section 22, has occurred, but forbids them from looking beyond these journals to debates on the floor of the House or Senate. *See, Jensen v. Matheson,* 583 P.2d 77 (Utah 1978). *See also, Dean v. Rampton,* 538 P.2d 169 (Utah 1975) (use of journals permitted to resolve dispute under signature requirements of Utah Constitution, Article VI, Section 24). *But see, McGuire v. U. of Utah Medical Center,* 603 P.2d 786, 790 (1979) (court relies upon floor debates in resolving clear title dispute under Article VI, Section 22).

which is the subject of log-rolling. The phrase, "one subject," is the historical code, adopted by many state constitutions, to express this purpose. Log-rolling sometimes is obvious from the circumstances surrounding the passage of a bill – for example, when one bill initially fails on its merits, but then, through combination with an appropriations rider or more popular measure, achieves enactment.

More often, however, log-rolling occurs behind the scenes and is not obvious. In these instances, the "one subject" language becomes a tool by which courts analyze and ascertain which bills bear the earmarks or "badges" of log-rolling. In these cases, if the parts of a bill have no necessary relationship vertically and horizontally – that is, if they do not relate meaningfully to a larger purpose and as parts, working together, in serving that goal – they are *deemed* to be the product of log-rolling in contravention of the single subject rule.

In testing whether the parts of a bill "work together," courts in general and this Court in particular have looked to a variety of factors. These include whether the parts of the bill have a necessary internal relationship, whether the subject matter of the subparts of the bill historically have been treated together, whether the bill is administered by a single agency, and whether money measures are combined with substantive legislation.

As demonstrated below, SB 2 fails all of these single subject tests. The circumstances surrounding passage of SB 2, as alleged in the complaint, show that it obviously was the product of log-rolling. All of the 14 bills that ultimately

became SB 2 were introduced, reviewed, debated, and voted upon as single subjects. Several of the bills actually were defeated by majority vote in the House of Representatives or failed to obtain committee approval in the House or Senate. All ultimately were rolled into one bill, SB 2, together with budgetary amendments and appropriations riders, showing that, but for the combination of money measures and popular bills, these previously defeated bills would not have passed.

Even without this obvious log-rolling which appears from the record of the legislative proceedings, SB 2 facially does not qualify as a single subject for purposes of Article VI, Section 22. This also is clear from the allegations in the complaint – or inferences fairly to be drawn from those allegations. SB 2's parts may be about "education," but those educational parts are omnibus within the meaning of the single subject rule, including, as they do, everything from computer training for pre-school children to financial literacy for adult learners and from an international baccaulareate program to domestic arts initiatives.

These omnibus parts, moreover, bear no relationship to each other. They never before, speaking historically, have been packaged together in a conglomerate bill. The subparts of SB 2 are so disparate in subject-matter, purpose, and effect that the legislature has provided for their implementation and administration by entirely different agencies, the Utah State Board of Education, local school boards, and the Utah Department of Human Resource Management, the latter of which traditionally has nothing whatsoever to do with educational

affairs in the state of Utah. In still another subpart, SB 2 proscribes any administrative role for the Utah State Board of Education and delegates supervisory power to private businesses. The intermixture of general legislation with money measures also indicates a facial violation of the single subject rule.

In showing how SB 2 violates the single subject requirement of Article VI, Section 22, plaintiffs' argument will proceed in 4 stages. First, plaintiffs will make clear how the single subject requirement, in effect, is a prohibition against log-rolling. Second, plaintiffs will show that, by combining money measures with substantive law, SB 2 violated the single subject rule. Third, plaintiffs will demonstrate that SB 2's passage, on the face of the legislative record, was the product of log-rolling. Fourth, and finally, plaintiffs argue that, independent of the legislative record, the contents of SB 2, when analyzed under traditional single subject tests, evidence a violation of the single subject mandate.

A. THE PURPOSES SERVED BY ARTICLE VI, SECTION 22 IN UTAH'S CONSTITUTIONAL ORDER

Utah Constitution, Article VI, Section 22, in relevant part, states that, "Except general appropriation bills and bills for the codification and general revision of laws, no bill shall be passed containing more than one subject, which shall be clearly expressed in its title." Since ratification as part of Utah's Constitution in 1896, this provision has been treated in no fewer than 45 Utah Supreme Court opinions. These opinions contain a litany of guidelines for the application of Article VI, Section 22. But all of these guidelines may be distilled

down to the following principles: Article VI, Section 22, is a mandatory limitation upon legislative power.[4] Hence, although every law enjoys a presumption of constitutionality, this presumption is rebuttable upon a showing that the manner in

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[4] *See, e.g., State v. Beddo,* 63 P. 96, 97 (Utah 1900) ("[t]hese provisions are clearly restrictive and mandatory[ ]"). In *Beddo,* a defendant's conviction for rape was declared void because the statute which had conferred jurisdiction upon a district attorney's office to conduct the prosecution was enacted in violation of the procedural requirements of Article VI, Section 22. *Beddo* was followed in *State v. Morrey,* 64 P. 764, 765 (Utah 1901) which overturned a conviction for adultery upon the same ground. Underscoring the mandatory character of these constitutional requirements, the Court said, "Such is our conclusion, notwithstanding the statement of counsel for the prosecution that 'many criminals of the lowest order' must be released under that decision. It would seem needless to say that, if such be a fact, it can have no weight with a court in passing upon the constitutionality of a statute. Nor does such fact furnish any reason whatever for upholding an enactment made in violation of the fundamental law." *See also, State v. Buker,* 64 P. 1118 (Utah 1901) (overturning conviction for adultery); *State v. McNally,* 64 P. 765 (Utah 1901) (overturning conviction for arson); *Connors v. Pratt,* 112 P. 399, 400 (Utah 1910) (overturning conviction for murder).

Constitutional mandates, in other words, may not be bent or broken on the altars of expediency or convenience. This Court consistently has maintained that these procedural requirements are mandatory, not merely directory, in character. *See, e.g., Baker v. Department of Registration,* 3 P.2d 1082, 1090 (Utah 1931) (great weight of authority holds that this constitutional provision is "mandatory"); *State v. Edwards,* 95 P. 367, 368 (1908) ("[t]he provision is mandatory, and may not be ignored[ ]"); *Marioneaux v. Cutler,* 91 P. 355, 359 (Utah 1907) (legislature "may not disregard" these constitutional requirements or evade them "by simply making the legislative intention clear in the act itself[ ]").

Some Utah cases, in affirming this result, cite Utah Constitution, Article I, Section 26, which states that, "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."

which the law achieved enactment was inimical to the purposes to be served by Article VI, Section 22.[5]

The central inquiry in this case, therefore, is what purposes are served by Article VI, Section 22, and was SB 2 passed in derogation of those ends. Just as the judicial branch is concerned with "due process" in the adjudication of disputes, our legislative department, because of Article VI, Section 22, must observe a form of "due process," embracing the principles of fairness and transparency, in the enactment of laws.[6] Speaking generally, this means that laws which are the product of fraud, chicanery, trickery, or surprise are interdicted by Article VI, Section 22.[7] Indeed, provisions such as Article VI, Section 22, were insisted upon

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[5] *See, e.g., Kent Club v. Toronto,* 305 P.2d 870, 873 (Utah 1957) ("[t]he title and the act should be surveyed in the light of the purpose[s] of [Article VI, Section 22] of the Constitution [one of] which is to guard against the surreptitious or inadvertent inclusion of subjects in legislation without legislators and the public being aware of its contents[ ]"); *State v. Barlow,* 153 P.2d 647, 655 (Utah 1944) ("'. . . the constitutional provision should be so applied as to guard against the real evil which it was intended to prevent[ ]'" [citation omitted]); *Baker v. Department of Registration,* 3 P.2d 1082, 1090 (Utah 1931) ("'. . . that the constitutional provision should be so applied as to guard against the real evil which it was intended to meet. . .'" [citation omitted]); *Utah State Fair Ass'n v. Green,* 249 P. 1016, 1025, (Utah 1926) (same); *State v. McCornish,* 201 P. 637, 639 (Utah 1921) (same); *Salt Lake City v. Wilson,* 148 P. 1104, 1109 (Utah 1915) (Article VI, Section 22, should be applied to effect its purpose, namely, "in preventing the combination of incongruous subjects neither of which could be passed when standing alone[ ]"); *State v. Edwards,* 95 P. 367, 368 (Utah 1908) (". . . that the constitutional provision should be so applied as to guard against the real evil which it was intended to meet. . .").

[6] *See, e.g.,* Linde, "Due Process of Lawmaking," 55 NEB. L. REV. 197 (1976).

[7] Constitutional provisions like those found in Article VI, Section 22, of Utah's Constitution, by most accounts, had their origin in reaction to the infamous Yazoo

Act passed by the Georgia state legislature in 1795. The bill, a product of an obscure title and outright bribery, approved a land deal. A later session of the same legislature undid the deal, but, in the meantime, the original grantees had sold their land to persons who claimed the status of *bona fide* purchasers for value. The validity of this status was questioned in litigation and sustained on federal constitutional grounds by the United States Supreme Court in *Fletcher v. Peck,* 12 U. S. (6 Cr.) 87 (1810). *Fletcher* held, as a matter of federal law incidental to the constitutional challenge, that courts could not explore legislative motives, however corrupt, in determining the validity of legislation. Many state constitutional conventions opposed this federal rule, however, and, in its place, established remedial measures so that the judicial branch, in stipulated instances, might overrule legislative misrule. *See, e.g.,* Dragich, "State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges," 38 HARV. J. LEGIS. 103, 104 (2001); Ruud, "'No Law Shall Embrace More Than One Subject,'" 42 MINN. L. REV. 389, 391-392 (1958).

Most state constitutions have provisions which are similar to or the same as Article VI, Section 22, of the Utah Constitution. The legal literature discussing these provisions is substantial. For a sampling, *see, e.g.,* Catalano, "The Single Subject Rule: A Check on Anti-Majoritarian Logrolling," 3 EMERGING ISSUES IN STATE CONSTITUTIONAL LAW 77 (1990); Denning and Smith, "Uneasy Riders: The Case for a Truth-in-Legislation Amendment," 1999 UTAH L. REV. 957; Dragich, "State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges," 38 HARV. J. LEGIS. 103 (2001); Figinski, "Maryland's Constitutional One-Subject Rule: Neither a Dead Letter Nor an Undue Restriction," 27 U. BALT. L. REV. 363 (1998); Gillette, "Expropriation and Institutional Design in State and Local Government Law," 80 VA. L. REV. 625 (1994); Hoffer and McDade, "Of Disunity and Logrolling: Ohio's One-Subject Rule and the Very Evils It Was Designed to Prevent," 51 CLEV. ST. L. REV. 557 (2004); Landau, "The Intended Meaning of 'Legislative Intent' and Its Implications for Statutory Construction in Oregon," 76 ORE. L. REV. 47 (1997); Popkin, "The Collaborative Model of Statutory Interpretation," 61 S. CAL. L. REV. 541 (1988); Ruud, "'No Law Shall Embrace More Than One Subject,'" 42 MINN. L. REV. 389 (1958); Williams, "State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement," 48 U. PITT. L. REV. 797 (1987).

Utah Supreme Court Justice Christine Durham, writing as a historian, notes that Article VI, Section 22, and related measures in Utah's constitution debar conduct "which had been a source of much corruption in mid-nineteenth-century

by state-constitution-makers in the 19th Century, because of a popular consensus that legislatures too easily could be corrupted by special interests, absent this sort of substantive and procedural limitation.[8] And, in particular, it means that laws which are passed as a result of "log-rolling" are unconstitutional in light of Article VI, Section 22. Log-rolling occurs whenever bills are bundled as a means to achieve passage in the event that a bill or bills, standing alone, cannot. In these instances, a legislative minority, through combination with another bloc of votes, can become a majority or at least a plurality for the bill in question. Article VI, Section 22, is designed to ensure that a bill's passage is based upon substantial merit rather than parliamentary maneuver, and that the fundamental requirement that every bill achieve passage by a constitutional majority not be defeated or impaired by artificial, anti-majoritarian manipulations.[9]

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legislatures." Greenwood, Durham, and Wyer, "Utah's Constitution: Distinctively Undistinctive," THE CONSTITUTIONALISM OF AMERICAN STATES, at 658 & n. 32 (Connor and Hammonds, eds., 2008). Article VI, Sections 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 14, 15, 16, 22, 24, 26, 28, 29, 31, and 33, all mandate or encourage, directly or indirectly, ethical conduct, fair process, the accountability of legislators, and public disclosure of legislatively related transactions.

[8] *See, e.g.,* Thompson, "The Theory of State Constitutions," 1966 UTAH L. REV. 542, 545.

[9] In *Pass v. Kanell,* 100 P.2d 972, 978 (Utah 1940), Justice McDonough, although speaking in dissent, articulates these purposes and principles by quoting from a leading treatise respecting single subject and clear title jurisprudence: "'The mischief sought to be remedied by the requirement of a single subject or object of legislation was the practice of bringing together in one bill matters having no necessary or proper connection with each other but often entirely unrelated and even incongruous. By the practice of incorporating in proposed legislation of a

meritorious character provisions not deserving of general favor but which, standing alone and on their own merits, were likely to be rejected, measures which could not have been carried without such a device and which were sometimes of a pernicious character were often incorporated in the laws; for, to secure needed and desirable legislation, members of the legislature were, by this means, often induced to sanction and actually vote for provisions which, if presented as independent subjects of legislation, would not have received their support. It was also the practice to include in the same bill wholly unrelated provisions, with the view of combining in favor of the bill the supporters of each, and thus securing the passage of several measures, no one of which could succeed on its own merits. To do away with this hodge podge or 'log rolling' legislation was one, and perhaps the primary, object of these constitutional provisions. Another abuse that developed in legislative bodies was the practice of enacting laws under false and misleading titles, thereby concealing from the members of the legislature, and from the people, the true nature of the laws so enacted. It is to prevent surreptitious legislation in this manner that the subject or object of a law is required to be stated in the title. While the objects of these constitutional provisions are variously stated, the authorities are agreed that they were adopted to remedy these and similar abuses. The purposes of these constitutional provisions have been summarized as follows: (1) to prevent 'log rolling' legislation; (2) to prevent surprise, or fraud, in the legislature by means of provisions in bills of which the titles give no intimation, and (3) to apprise the people of the subject of legislation under consideration.'" (Citation omitted.)

Likewise, *Utah State Fair Ass'n*, 249 P. 1016, 1024 (Utah 1925) quotes a treatise on state constitutional law which observes that: "'The practice of bringing together into one bill subjects diverse in their nature and having no necessary connection, with a view to combine in their favor the advocates of all, and thus secure the passage of several measures, no one of which could succeed upon its own merits, was one both corruptive of the Legislator and dangerous to the state. It was scarcely more so, however, than another practice, also intended to be remedied by this provision, by which, through dexterous management, clauses were inserted in bills of which the titles gave no intimation, and their passage secured through legislative bodies whose members were not generally aware of their intention and effect. There was no design by this clause to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus multiplying their number; but the framers of the Constitution meant to put an end to legislation of the vicious character referred to, which was little less than a fraud upon the public, and to require that in every case the proposed measure should stand upon its own merits, and that the Legislature should be fairly satisfied of its design when required to pass upon it.'" (citation omitted). *See also, Baker v. Department of Registration,* 3 P.2d 1082, 1090 (Utah 1931).

B. SB 2 VIOLATES THE SINGLE SUBJECT RULE BY BUNDLING SUBSTANTIVE LAW WITH BUDGETARY AMENDMENTS AND APPROPRIATIONS MEASURES

Plaintiffs' complaint alleges that SB 2 combines substantive law with budgetary amendments and appropriations measures. In addition, the complaint alleges that certain bills were introduced as single subjects in their own right, dealing with distinct substantive issues. These bills failed on the floor of the House and in committee in the House and the Senate. They were revived at the end of the session, bundled with budget amendments and appropriations measures, and thus achieved passage via SB 2.[10]

The importance of majority rule receives expression twice in our state constitution, once in Article VI, Section 1, and again in Article VI, Section 22.

[10] The complaint plainly alleges that money was the key in obtaining passage of these previously failed bills through the omnibus maneuver. Paragraph 83 is one example of many which can be cited in this regard. Paragraph 83, in part, avers: "In particular, and without limiting the foregoing, plaintiffs point the Court to statements made by a member of the legislature in the wake of SB 2's passage. Michael Waddoups, the Republican Senator from District 6, issued a written statement to all delegates at the Salt Lake County Republican Convention on or about May 10, 2008. The statement reads, in pertinent part, 'This funding bill [SB 2] was presented to the legislature the day before the session ended leaving no time to debate the bill and rewrite a new one. It was put together by House and Senate Leadership. This is not the way funding is traditionally handled. I thought it was wrong then and I still think it is wrong. However, I, along with almost every other legislator, voted for it because we were faced with the problem that school funding was included in this bill. Had we not voted for the bill education would have remained unfunded. Many of the senators were upset about it and we are currently in the process of seeing it never happens again.'"

The bundling of substantive law and budgetary amendments and appropriations measures, however, is a *per se* violation of the single subject rule. This is because (a) substantive laws and money bills are deemed to be different subjects for purposes of the rule, and, (b) in any event, the conjunction of law and money is log-rolling in contravention of the rule.

Washington State Legislature v. State, 985 P.2d 353 (Wash. 1999) (*en banc*) illustrates these points. The *Washington State Legislature* opinion applied Washington state's single subject rule[11] to a bill which combined substantive welfare legislation with general appropriation measures, and declared this combination unconstitutional. *Id.* at 362-263.

In reaching this result, the Court reasoned that substantive laws and money measures are inherently different subjects, two different species of legislative enactment, for purposes of the single subject rule: "'An appropriation bill is not a law in its ordinary sense. It is not a rule of action. It has no moral or divine sanction. It defines no rights and punishes no wrongs. It is purely *lex scripta.* It is a means only to the enforcement of law, the maintenance of good order, and the life of the state government. Such bills pertain only to the administrative functions of government.'" *Washington State Legislature v. State,* 985 P.2d at 362 (citation omitted).

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[11] Washington Constitution, Article II, Section 19, at the time of the opinion, provided that, "No bill shall embrace more than one subject, and that shall be expressed in the title." This "single subject" language is virtually identical to that found in Utah Constitution, Article VI, Section 22.

The Court next explained that, since money bills are a "compulsory outcome" of each session of every legislature, such bills are a "convenient target" for the kind of horse trading that becomes log-rolling. *Washington State Legislature v. State,* 985 P.2d at 362 & n. 6: "Moreover, by their omnibus nature, budget bills offer too tempting a target for legislative logrolling, which art. II [Section] 19 forbids. Issues that failed on their merits may not be resurrected by their inclusion in an operating budget bill. Policy legislation must pass or fail on its own merits, taking the normal course of a bill." *Id.* at 362 (citation omitted). *See also, Flanders v. Morris,* 558 P.2d 769 (Wash. 1977) (substantive law which could not pass on its own merit achieves enactment "by being slipped into a 45-page appropriations bill;" this violates single subject rule).

This Court should adopt the reasoning and result of the *Washington State Legislature* opinion.[12] The Utah Supreme Court, so far as plaintiffs' research has

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[12] Washington state, of course, is not the only state which follows this rule. For other examples, please *see, e.g., City of North Miami v. Florida Defenders of the Environment,* 481 So.2d 1196, 1196 (Fla. 1986) (bill which combined amendment to substantive law and appropriations measure held unconstitutional under Florida state constitution's version of single subject rule; "[w]e hold that [the bill] violates [the single subject rule] of the Florida Constitution because it is an appropriations bill that changes and amends existing law on subjects other than appropriations . . . [citations omitted]"); *Department of Educ. v. Lewis,* 416 So.2d 455, 459-461 (Fla. 1982) (bill combining substantive restriction on appropriated funds with appropriations measure held unconstitutional under Florida state constitution's version of single subject rule; "[a]n extensive body of constitutional law teaches that the purpose of [the single subject rule] is to ensure that every proposed enactment is considered with deliberation and on its own merits. A lawmaker must not be placed in the position of having to accept a repugnant provision in order to achieve adoption of a desired one. [Citations omitted] . . . . Through a number of cases decided over many years this court has attempted to make clear to

disclosed, never has ruled directly on this precise issue; to that extent, our case is a matter of first impression. But the seminal commentator on single subject

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the Legislature that under our constitutional plan for the lawful exercise of governmental powers an appropriations act is not the proper place for the enactment of general public policies on matters other than appropriations. [Citations omitted]. In [one case], the Court said: 'The enactment of laws providing for general appropriations involves different considerations and indeed different procedures than does the enactment of laws on other subjects. Our state constitution demands that each bill dealing with substantive matters be scrutinized separately through a comprehensive process which will ensure that all considerations prompting legislative action are fully aired. Provisions on substantive topics should not be ensconced in an appropriations bill in order to logroll or to circumvent the legislative process normally applicable to such action. Similarly, general appropriations bills should not be cluttered with extraneous matters which might cloud the legislative mind when it should be focused solely on appropriations matters[ ]'" [Citation omitted]); *State ex rel. Stephan v. Carlin,* 631 P.2d 668, 673 (Kan. 1981) (bill combining general legislation and appropriations measures declared unconstitutional under Kansas constitution's virtually identical version of single subject rule; "[t]he inclusion of unrelated legislation in an important and extensive appropriations bill, at the end of the session, is particularly illustrative of the possible harm [the single subject rule] is intended to prevent[ ]"); *Ex Parte Georgetown County Water & Sewer Dist.,* 327 S.E.2d 654, 656 (S. C. 1985) (bill which combined special-purpose district voting provisions and appropriations measures held unconstitutional under South Carolina constitution's virtually identical version of single subject rule; "[t]he subject of an appropriations bill is solely to make appropriations to meet the ordinary expenses of state government and to direct the manner in which the funds are to be expended[ ]"); *Strake v. Court of Appeals,* 704 S.W.2d 746, 748 (Tex. 1986) (bill which combined salary modification for state official with appropriations measures declared unconstitutional under Texas version of single-subject rule; "[a] rider which attempts to alter existing substantive law is a general law which may not be included in an appropriations act[ ]"). *Cf. Sellers v. Frohmiller,* 24 P.2d 666, 669 (Ariz. 1933) (appropriation bill and general legislation are different subjects; "'[a]s has been observed in well-reasoned cases, if the practice of incorporating legislation of general chacter in an appropriation bill should be allowed, then all sorts of ill conceived, questionable, if not vicious, legislation could be proposed with the threat, too, that, if not assented to and passed, the appropriations would be defeated[ ]'" [citation omitted]); *Litchfield Elementary, Etc. v. Babbitt,* 608 P.2d 792, 800-803 (Ariz. Ct. App. 1980) (". . . the appropriations process cannot be used for legislation[ ]" [citations omitted]).

constitutional issues, Millard Ruud, citing *dicta* from two Utah Supreme Court opinions, has implied that Utah would follow those holdings which forbid the intermixture of law and money.[13] Another Utah opinion, overlooked by Ruud, states that the bundling of revenue measures and regulatory law, if it were to occur, would violate the single subject proviso of Article VI, Section 22.[14] Still another Utah case analogically implies the same outcome.[15] And other authorities generally concur that the rationale of *Washington State Legislature* is a sound application of single subject principles.[16]

Using budget amendments and appropriations riders to leverage the passage of substantive laws offends the policies and principles of the single subject

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[13] *See,* Ruud, "'No Law Shall Embrace More Than One Subject,'" 42 MINN. L. REV. 389, 433 and 434 & ns. 173 and 174 (1958), citing *dictum* from *State ex rel. Davis v. Cutler,* 95 P. 1071, 1072-73 (Utah 1908) and the reasoning from *Thomas v. Daughters of Utah Pioneers,* 197 P.2d 477, 496-497 (Utah 1948).

[14] *See, Carter v. State Tax Commission,* 96 P.2d 727, 733-734 (Utah 1939) (bundling of revenue measure and regulatory law would violate clear title and single subject provisos of Article VI, Section [22]) (*dictum*).

[15] *See, Petty v. Utah State Bd. Of Regents,* 595 P.2d 1299, 1301 (Utah 1979) (appropriations measure cannot be read to amend substantive law: ". . . [i]t is important to have in mind that the purpose of the Appropriations Act is to allocate finances, and not to affect substantive changes in the law on other matters[ ]").

[16] *See, e.g.,* Catalano, "The Single Subject Rule: A Check on Anti-Majoritarian Logrolling," 1990 EMERGING ISSUES IN STATE CONSTITUTIONAL LAW 77, 79 and 80; Denning and Smith, "Uneasy Riders: The Case for a Truth-in-Legislation Amendment," 1999 UTAH L. REV. 957, 963; Ruud, "'No Law Shall Embrace More Than One Subject,'" 42 MINN. L. REV. 398, 413-443 (1958). Of course, the case law, cited above in footnote 12 of this brief, likewise supports this analysis.

language in Article VI, Section 22. The complaint alleges that this is exactly what transpired during passage of SB 2. This violation is underscored, according to the allegations of the complaint, because some of the substantive laws were defeated by majority vote in the House or did not have sufficient merit, on their own, to survive committee hearings, and, but for the fulcrum of money, never would have become law. Hence, the complaint states a claim in this respect under Rule 12(b)(6).[17]

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[17] The single subject rule also is designed to protect the governor's line-item veto power under state constitutions, a power which often is threatened or undercut by legislation which combines substantive law and appropriations measures. *See, e.g.* 1A N. J. Singer, STATUTES AND STATUTORY CONSTRUCTION, Section 17:1, at 8-9 (6th ed. 2002 rev.). If this matter goes to trial, plaintiffs will endeavor to show that this may have occurred in connection with SB 2.

Utah's governor is given line-item veto power in Article VII, Section 8(3), of Utah's Constitution which provides, in pertinent part, that, "The governor may disapprove any item of appropriation contained in any bill while approving other portions of the bill." According to some accounts, Governor Huntsman may hold the view that he cannot exercise his line-item veto power except in cases where the bill is strictly an appropriations measure without substantive provisions, perhaps following the reasoning in cases such as *Colorado General Assembly v. Owens,* 136 P.3d 262, 273-274 (Colo. 2006) (*en banc).* Thus, he may have concluded that his line-item veto power was emasculated by SB 2, since that legislation, as already noted, combined general legislation with budget amendments and appropriations riders. In the event, the enactment of omnibus legislation of this sort, not only defeats the anti-log-rolling purpose of Article VI, Section 22, but also impairs, if it does not entirely compromise, gubernatorial prerogatives under Article VII, Section 8(3). The latter consequence, of course, inflicts harm upon the foundational principle of separation of powers under Article V of Utah's Constitution and presents an additional reason to guard carefully the "due process in lawmaking" provisions of Article VI, Section 22.

C. SB 2 IS THE PRODUCT OF LOG-ROLLING AND, THEREFORE, VIOLATES THE SINGLE SUBJECT RULE

Even if the Court does not agree that the bundling of substantive law, budget amendments, and appropriations measures in the same bill is a *per se* violation of the single subject rule, SB 2 offends the anti-log-rolling purpose behind Article VI, Section 22. In this regard, plaintiffs' complaint alleges that SB 2 is the sum of 14 bills, all of which started as single subject measures. All initially were introduced, reviewed, considered, and debated as separate, stand-alone legislation. Two of these bills were defeated by majority vote in the House. Two others lacked sufficient merit to survive committee hearings. These failed bills were revived and, through bundling in SB 2, were allowed to ride "piggy-back" on popular legislation and money measures to enactment at the eleventh hour of the 2008 general session. Accordingly, the complaint alleges that SB 2 is the product of log-rolling.

Once again, a Washington case, *Power, Inc. v. Huntley,* 235 P.2d 173 (Wash. 1951), perfectly illustrates the reason SB 2 must be declared unconstitutional in this case. In *Huntley,* the state legislature considered the passage of two bills; one was an amendment to the tax code and the other was an appropriations measure. One of these bills failed in the Senate, but, when combined, they both were enacted into law. When challenged under the single subject rule, the Court said, "We have here a situation in which neither the appropriation bill . . . nor the corporation income tax bill . . . standing on its own

merits, could pass the legislature in the special session, but when the proponents of these measures combined their interests, both were enacted . . . This is the clearest possible illustration of the kind of 'logrolling,' the 'you-scratch-my-back-and-I'll-scratch-yours' situation that the constitutional provision was designed to prevent." *Id.* at 178.

The Court quotes from a Pennsylvania opinion, *Commonwealth v. Barnett,* which details the reasons for and purposes behind the interdiction of so-called omnibus bills, which "'became a crying evil, not only from the confusion and distraction of the legislative mind by the jumbling together of incongruous subjects, *but still more* by the facility they afforded to corrupt combinations of minorities with different interests to force the passage of bills with provisions which could never succeed if they stood on their separate merits. So common was this practice that it got a popular name, universally understood as 'logrolling.' A still more objectionable practice grew up, of putting what is known as a 'rider' (that is, a new and unrelated enactment or provision) on the appropriation bills, and thus coercing the executive to approve obnoxious legislation, or bring the wheels of the government to a stop for want of funds.'" *Power, Inc. v. Huntley,* 235 P.2d at 178 (citation omitted) (emphasis supplied).

Although the anti-log-rolling purpose of Article VI, Section 22, frequently has been noted in Utah Supreme Court opinions, none of those opinions has treated log-rolling facts such as those alleged in the complaint now before this Court. But the Utah cases, like *Huntley,* repeatedly instruct that Section 22's

limitation on legislative power is designed to prevent log-rolling and should be interpreted and applied to that end.[18]

With these instructions in view, plaintiffs submit that, if Article VI, Section 22, is to have any meaning whatsoever, it has to be applied to strike down the log-rolling which spawned SB 2 in this case. Put differently, if Article VI, Section 22, is not so applied to SB 2, it is impossible to imagine a case where it would have any application at all. In that event, what our constitution and cases describe as a "mandatory" and "prohibitory" constraint on the way in which the legislature conducts its business would become meaningless. In short, by alleging that SB 2's passage was based upon the *actual occurrence of log-rolling* (as distinct from "divining" the existence of log-rolling through a facial examination of the various parts of the entire bill, as discussed more fully below), plaintiffs have stated a claim upon which relief may be granted within the meaning of Rule 12(b)(6).

D. SB 2 VIOLATES ARTICLE VI, SECTION 22, BECAUSE, AS AN OMNIBUS BILL, IT EMBRACES MORE THAN A SINGLE SUBJECT

Even if we ignore the mixture of substantive law with budget amendments and appropriations measures and the log-rolling that was instrumental to passage of SB 2, the bill still may offend Article VI, Section 22. This is because, independent of the actual log-rolling which is apparent from the legislative record,

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[18] Please see the discussion above, with Utah case citations, under that section of this brief styled "A.The Purposes Served by Article VI, Section 22, in Utah's Constitutional Order."

a facial examination of the bills which comprise SB 2 shows that they represent multiple subjects in contravention of Article VI, Section 22.

In the lower court, defendants attempted this facial examination and concluded that, since all 14 bills which were combined into SB 2 pertain to "education," they all deal with a "single subject" within the meaning of Article VI, Section 22. But this conclusion proves too much. All legislation may be classified under at least one heading, such as "government," and, in the event, all laws would embrace no more than a single subject, depriving Article VI, Section 22, of any real meaning. What is more, an analysis of a bill's character on the basis of a generic appellation too easily might miss the "real evil" at which this constitutional proscription is aimed, namely, log-rolling. One's analytical tools, therefore, should be sharpened to the point which most readily detects and eradicates such legislative practices. And if generic appellations were conclusive, legislatures easily could evade this constitutional constraint, by adding declarations and stating intentions respecting each and every bill, a ploy which in fact may have been outlawed in an early case interpreting Article VI, Section 22.[19]

Hence, looking to the substantive content of particular bills, courts generally and this Court in particular have required more than merely a vertical relationship between the various components of an omnibus bill and a generic heading like "education." They also require some form of meaningful relationship

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[19] *See, e.g., Marioneaux v. Cutler,* 91 P. 355, 359 (Utah 1907).

between the subparts of the bill.[20] Whether that internal relationship has meaning or not can be measured by the yardsticks of history, statutory classification, administrative practice, or the like. When judged by these standards, the subparts of SB 2 truly can be seen as a "hodge-podge" and "Christmas tree" enactment. The paucity of internal relationship is apparent, even transparent, upon examination of the parts which artificially were thrust together at the hurried end of a busy session in order to make up a whole.

Apart from the exceedingly thin thread of "education," none of the 14 bills in SB 2 has any "natural" or "necessary" connection to another. One of the bills which was voted down by the entire House (when it was a single-subject measure), HB 200, deals with "Early Childhood Learning and Evaluation." This

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[20] *See, e.g., Pass v. Kanell,* 100 P.2d 972, 974-975 (Utah 1940) (bill dealt with common subject of vehicles but vehicle registration and insurance/liability deemed separate under Article VI, Section 22); *AFL v. Langley,* 168 P.2d 831 (Idaho 1946) (bill dealt with common subject of labor unions, but because there was no unified core the act was declared void).

This Court has used a variety of verbal formulas to get at this problem. *See, e.g., Utah State Fair Ass'n v. Green,* 249 P. 1016, 1024 (Utah 1926) (Article VI, Section 22, forbids the combining of subjects "'which, in a legal sense, have no connection with, or proper relation to each other'" or "'incongruous and unrelated matters[;]'" statutes will be upheld "if all the parts . . have a natural connection'" [citations omitted]); *State v. Olson,* 205 P. 357, 339 (Utah 1922) (one provision is "of necessity" included with another); *State v. McCornish,* 201 P. 637, 638 (Utah 1921) (bills must be "cognate and related to each other"); *State v. Edwards,* 95 P. 367, 369 (Utah 1908) (bills must be "germane or related to one another;" bills may not be "incongruous or inconsistent"). *See also, Pass v. Kanell,* 100 P.2d 972, 978 (Utah 1940) ("'. . . bringing together in one bill matters having no necessary or proper connection with each other but often entirely unrelated and even incongruous. . .'" [citation omitted]) (J. McDonough, dissenting).

bill creates a program for pre-school children, encouraging their use of computer technology as a learning tool. Were an evidentiary hearing to be conducted, HB 200 may be shown as nothing more than a legislative boondoggle for a software vendor who had a lobbyist who had a relationship with a proponent of the bill.[21] But in any case the bill treats pre-school computer programming, and bears no relationship, whether natural or unnatural, to any other part of SB 2. Another bill which was voted down by the entire House (when it was a single-subject measure), HB 278, treats the taxation of school districts as a means to achieve charter school funding. Nothing else in SB 2 bears even remotely on charter schools. In short, there is something for everybody in SB 2, money for software vendors, subsidies for charter schools, adult financial literacy programs, school textbook vetting mechanisms, teacher salary adjustments, and arts funding. All play on the theme of education, but there is no instrumental or integrating score. The result is a dissonant, cacophony of subjects which by no means are single in the sense intended under Article VI, Section 22.

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[21] *See, e.g.,* Ruud, "'No Law Shall Embrace More Than One Subject,'" 42 MINN. L. REV. 389, 405 (1958) ("[a]n act which deals with several distinct local or private interests is suspect; it has the earmarks of log-rolling – of combining several minority interests to get a majority vote for the whole. The mere fact that all of the local or private interests relate to a single general subject, such as . . . powers of municipal government, should not dissuade the court from finding the act invalid. The combining of these provisions, all of which could reasonably be grouped under one general subject or heading, was likely the result of a marriage of convenience only and not intellectual affinity[ ]").

SB 2 fails other tests which courts have devised to gauge the quality of the relationship between multiple subjects in a single bill for purposes of applying provisions like Article VI, Section 22. There is, for example, no *historical* precedent for SB 2's combination of minimum school budget provisions and the other educational programs found in the legislation.[22] As another example, SB 2's reliance upon three different state agencies (one of which has nothing traditionally to do with education), in addition to private companies, to administer its conglomeration of bills strongly suggests that it does not embrace a single subject for constitutional purposes.[23]

Indeed, this lack of relationship between the subparts of SB 2 is confirmed, not only by the above analysis of its various subparts, but also by the very process through which it obtained enactment. The bills which were packaged into SB 2 were not part of a coordinated legislative objective to achieve an integrated educational goal. As noted throughout this brief, and as alleged with particularity

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[22] *See, e.g., Salt Lake City v. Wilson,* 148 P. 1104, 1109 (Utah 1915) (consolidation of laws which "have been enforced for a generation or more[ ]"); *Marioneaux v. Cutler,* 91 P. 355, 359 (1907) (treatment of mileage allowances and salary issues for state judges in one bill is "border-line," but passes muster under single-subject challenge because these items have been linked historically by statutes and constitution). *See also,* Ruud, "'No Law Shall Embrace More Than One Subject,'" 42 MINN. L. REV. 389, 408 (1958) (past or settled legislative practice; "[t]he fact that the matters have always been dealt with separately in the past does suggest that the reason for their being combined for the first time in one bill is log-rolling[ ]").

[23] *See, e.g.,* Catalano, "The Single Subject Rule: A Check on Anti-Majoritarian Logrolling," 3 EMERGING ISSUS IN STATE CONSTITUTIONAL LAW 77, 78 (1990) (legislation which involves more than one state entity is suspect under single subject rules).

in plaintiffs' complaint, all 14 of the bills which comprise SB 2 were introduced, reviewed, debated, and voted upon, in committee hearings and on the floors of the House and Senate, as unconnected, even disjointed, separate, single subjects for all but the last two days of the session. These procedural choices demonstrate that, in the legislature's well-considered judgment, these bills most appropriately should have been treated apart rather than together. With respect, plaintiffs believe that this Court should defer to *that* judgment, rather than the last minute, hasty, and contrived decision which resulted in omnibus legislation, legislation which was created for no apparent reason other than to revive 4 of the bills which previously had failed.

The legislative judgment which treated the subparts of SB 2 as single subjects has been seconded by the Utah State Board of Education ("USBE" or "Board"). As alleged in the complaint, the USBE unanimously has voted its opposition to SB 2 because of that bill's omnibus character, asking Governor Huntsman to exercise his line-item veto power as a remedial tool in this regard. The USBE has the constitutional authority, long-term experience, and technical expertise to know whether there is any natural or necessary relationship between the parts and the whole of SB 2. The Board's considered opinion, expressed unanimously by vote and forcibly in a communication to the governor, is that there is none. This opinion underscores the allegations in plaintiffs' complaint --

namely, that, on a facial analysis, the subparts of SB 2 entail disparate subjects and not a single unit for constitutional purposes.[24]

Taking together the lack of internal relationship among the 14 subparts of SB 2, the legislative judgment that these subparts more appropriately should have been treated as single subjects, and the USBE's expert opinion which echoes this legislative judgment, the conclusion is overwhelming that this legislation is unconstitutional under Article VI, Section 22. At a minimum, plaintiffs' complaint which alleges or implies all of the above surely states a claim under Rule 12(b)(6).

XI. SUMMARY OF CLEAR TITLE ARGUMENT

Article VI, Section 22, requires, not only that bills embrace no more than one subject, but also that this subject clearly be expressed in the title of the proposed legislation. Utah's cases hold that, in order to satisfy this constitutional requirement, a bill's title must give fair notice to legislators and the public of what might be included in the legislation, and that it may not be "misleading" or

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[24] As this Court undoubtedly is aware, the USBE is the constitutionally established branch of government charged with the "general supervision and control" of the public education system. Utah Constitution, Article X, Section 3, provides that, "The general control and supervision of the public education system shall be vested in a State Board of Education." The "public education system" is defined in Utah Constitution, Article X, Section 2, to include "all public elementary and secondary schools and such other schools and programs as the Legislature may designate." "[G]eneral control and supervision," as used in Article X, Section 3, has been interpreted to mean "the direction and management of *all* aspects of [the] operation or business [of public education]." *Utah School Boards v. State Bd. of Educ.,* 17 P.3d 1125, 1129 (Utah 2001) (emphasis in original). This, indeed, is "plenary" power. *Id.* at 1130, quoting *In re Woodward,* 384 P.2d 110, 112 (Utah 1963). This interpretation of Article X, Section 3, recently was restated in *University of Utah v. Shurtleff,* 144 P.3d 1109, 1120 (Utah 2006).

productive of "surprise."[25] SB 2's official title, "Minimum School Program Budget Amendments," does not give fair notice and is positively misleading because it is under-inclusive in relation to the contents of the bill, and because it suggests that the legislation is a funding amendment rather than the hodge-podge of programs that it truly was.

Although Utah's opinions consistently have held that titles, when misleadingly under-inclusive in relation to the content of bills, offend Article VI, Section 22, no case, to plaintiffs' knowledge, ever has determined conclusively whether this offense may be commuted by our legislature's current practice of giving bills two titles, one of which is the official, short, under-inclusive label, and the other of which gives a synoptic, longer description. Plaintiffs believe that a second title will not save the first from constitutional infirmity. The language of Article VI, Section 22, language which may not be changed by a majority vote of the state legislature, is "title," not "titles." And, in this case, the *combination* of titles compounded rather than reduced confusion respecting the contents of SB 2.

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[25] Justice Latimer, writing in *Thomas v. Daughters of Utah Pioneers,* 197 P.2d 477, 508 (Utah 1948), provides a typical summation of factors: "The general rule has been announced that the title [of a bill] is sufficient if it is not productive of surprise and fraud and is not calculated to mislead the legislature or the people, but is of such character as fairly to apprise the legislators and the public of the subject matter of the legislation and to put anyone having an interest in the subject on inquiry."

A. SB 2'S TITLE, "MINIMUM SCHOOL PROGRAM BUDGET AMENDMENTS," IS UNDER-INCLUSIVE IN RELATION TO THE CONTENTS OF THE BILL, AND, THEREFORE, VIOLATES THE CLEAR TITLE REQUIREMENT OF ARTICLE VI, SECTION 22

Plaintiffs' complaint alleges that SB 2's title, "Minimum School Program Budget Amendments," is under-inclusive in relation to the contents of the bill, and, therefore, runs afoul of the clear title requirement of Article VI, Section 22. Plaintiffs submit that, in view of the cases discussed below, this allegation is sufficient to state a claim upon which relief may be granted for purposes of Rule 12(b)(6).

Ritchie v. Richards, 47 P. 670 (1896), was the first opinion to interpret the clear title requirement of Article VI, Section 22. The bill in *Ritchie* was titled, "An act related to and making sundry provisions concerning elections." The title's language, "related to" and "sundry provisions," seems comprehensive insofar as elections are concerned. But the Court held that, while a "provision for the election of a person to fill [a] vacancy" was included in the title, a "provision for appointing an incumbent in the meantime" was not. In other words, "[t]he general purpose described in the title includes the election, but does not include the appointment." *Id.* at 674. The bill's title, therefore, was under-inclusive in

relation to the subject matter of the legislation. That portion of the legislation, namely, the part dealing with appointments, was declared unconstitutional.[26]

Ritchie's holding and rationale, that a bill title which is under-inclusive in relation to the contents of legislation has a tendency to mislead both legislators and the public, consistently has been followed in Utah and reflects the clear title jurisprudence of other jurisdictions as well.[27] The complaint in this case alleges

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[26] The Utah Supreme Court's second to last opinion dealing with Article VI, Section 22, *Jensen v. Matheson,* 583 P.2d 77, 80 (Utah 1978), reaffirmed *Ritchie's* holding on the so-called enrolled bill doctrine, not only "because of veneration for its age and its authority as established law . . . [but also] for what we regard as its sound reasoning and salutary declaration of policy."

[27] *See, e.g., Pass v. Kanell,* 100 P.2d 972, 974-975 (Utah 1940) (bill's title mentions vehicle registration, but omits mention of liability for negligence in the use of uninsured rental vehicles, a subject treated in bill proper; title, therefore, is under-inclusive in relation to content of bill, and bill, accordingly, is unconstitutional under Article VI, Section [22]); *Carter v. State Tax Commission,* 96 P.2d 727, 733-734 (Utah 1939) (bill's title references regulatory, but not revenue raising, purpose of act, and, thus, if act had revenue raising purpose, the title would be under-inclusive and, hence, in violation of Article VI, Section 22) (*dictum*); *Riggins v. District Court of Salt Lake County,* 51 P.2d 645, 650-653 (Utah 1935) (title was under-inclusive, indicating the establishment of a system for liquor control, but omitting reference to bill contents dealing with power to borrow against state land board and power to lend of state industrial commission; in these instances, where the act is broader than the title, "' . . . it may happen that one part of it can stand because indicated by the title, while as to the object not indicated by the title it must fail[ ]'" [citation omitted]) (may be *dictum*); *Saville v. Corless,* 151 P. 51, 51-52 (Utah 1915) (bill's title says, "An act to regulate the working hours of all employes of mercantile establishment[;]" content of bill fixes hours during which stores may remain open; content, therefore, is not clearly expressed in title and law is unconstitutional under Article VI, Section 22); *State v. Yelle,* 342 P.2d 588, 592 (Wash. 1959) (state budget bill with title, "An act Adopting the supplemental budget and making appropriations for miscellaneous purposes, and declaring an emergency," which also included general legislation violates constitutional provision providing that, "No bill shall embrace more than one subject, and that shall be expressed in the title[ ]"). *See generally,* Dragich, "State

that SB 2's title is under-inclusive and, therefore, states a claim under Rule 12(b)(6).

B. SB 2'S TITLE, "MINIMUM SCHOOL BUDGET AMENDMENTS," IS MISLEADING AND CALCULATED TO SURPRISE, AND, THEREFORE, RUNS AFOUL OF THE CLEAR TITLE REQUIREMENT OF ARTICLE VI, SECTION 22

Plaintiffs' complaint alleges that SB 2's title, "Minimum School Program Budget Amendments," is misleading or calculated to surprise – all in derogation of the clear title requirement of Article VI, Section 22 -- for at least 4 reasons: (1) As noted above, the title is under-inclusive in relation to the actual contents of the entire legislation. (2) The minimum school budget is a term of art in respect of funding for education in the state of Utah. SB 2's title, therefore, suggests that the

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Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges," 38 HARV. J. LEG. 103, 116-117 and 146-151 (2001).

Ritchie's venerability as precedent, being decided the year our state's constitution was ratified, has been noted. *See, e.g., Dean v. Rampton,* 538 P.2d 169, 174 (Utah 1975) (Henriod, J., dissenting) (enrolled bill issue: "The Ritchie case has stood the test of time for over 80 years, enjoys the reputation of never having been criticised or questioned, and consequently rates very highly as an authority on that about which we are talking[ ]").

The cases involving under-inclusive titles are distinct from opinions such as *Utah State Fair Ass'n v. Green,* 249 P. 1016 (Utah 1926). *Green* treats the opposite problem under the title jurisprudence of Article VI, Section 22, namely, whether a broad, comprehensive, even over-inclusive title may be used to satisfy the constitutional requirement.

bill treats fiscal matters only. In fact, of course, the bill contains general legislation effecting changes in substantive law. (3) The reference to "budget amendments" implies that the bill is amendatory only. In fact, however, the bill contains original enactments and entirely new programs. (4) The title does not alert readers to the fact that SB 2, which started as a boxcar measure for fiscal legislation had become a legislative freight train, holding 13 new and additional bills which formerly were stand-alone proposals, and that included within these 13 bills were 4 bills which previously had failed of passage on the floor of the House and in committees in the House and Senate. Two circumstances exacerbated this latter omission. The metamorphosis of 14 single subject, stand alone bills – including the defeated and disapproved measures – into the amalgamation which was SB 2 occurred in the eleventh hour of the legislative session. At any trial of this matter, moreover, the evidence will show that, at least one of the proposals which failed in the House, under legislative rules, could not have been revived for reconsideration and inclusion in SB 2 or any other bill, and this circumstance underscores, not only the misleading nature of the truncated title, but also the element of stealth, skullduggery, and surprise by which that proposal was included, through the back-door, in the final enactment. Plaintiffs submit that, in view of the case law respecting clear title provisos, these allegations are sufficient to state a claim upon which relief may be granted for purposes of Rule 12(b)(6).

C. SB 2'S SECONDARY TITLE DOES NOT SAVE THE OFFICIAL TITLE FROM CONSTITUTIONAL INFIRMITY

Defendants are hard-pressed to deny that SB 2's title, "Minimum School Budget Amendments," is under-inclusive and misleading for all of the reasons alleged in the complaint. So they argue, instead, that the bill, by legislative rule, is given 2 titles, a long one in addition to the short one, and that, when read together, these titles are fairly descriptive of the entire contents of the legislation as passed. They even asserted, in the lower court -- without citing any authority for the point -- that all of the Utah cases have looked to the second or longer of the two titles in determining whether the constitutional requirement of Article VI, Section 22, has been met.

This argument fails, however, for at least 3 reasons. First, Article VI, Section 22, requires that the subject-matter of the proposed legislation be clearly expressed in a title, singular, not titles, plural. Defendants' argument does not account for the language of the constitution, language which cannot be altered by legislative practice, whether that practice is expressed in a rule or otherwise. Nor does defendants' argument account for the wisdom of the singular tense in the constitutional language. Where two titles, as opposed to one, may be considered, the opportunities for confusion or surprise, the very evils that the constitutional

requirement is intended to prevent, are compounded – especially where, as in our case, discrepancies may appear between the two titles.[28]

Second, plaintiffs respectfully dispute the assertion that Utah's cases rely upon the second, long title in conducting analyses for purposes of constitutional sufficiency under Article VI, Section 22. Plaintiffs have read all of these cases and there is nothing in them to indicate that a long title as opposed to a shorter label was used to conduct the analysis. In fact, two Utah cases strongly imply that the use of a second title may be constitutionally improper.[29]

Third, according to the cases, the intended beneficiaries of Article VI, Section 22's clear title requirement are the public at large and legislators in

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[28] For an example of this two-titled potential for confusion, where the parties are unsure which title should be read three times as constitutionally required under Article VI, Section 22, *see, Jensen v. Matheson,* 583 P.2d 77, 80-81 (Utah 1978).

[29] The facts of *State v. Edwards,* 95 P. 367, 369 (Utah 1908), suggest that the bill under consideration in that case had two titles, a short one and a longer synopsis. The Court stated that the second title could not be considered for purposes of analysis under Article VI, Section 22: "This [second title] was wholly unnecessary and the elimination of this surplus matter is not only justified, but is required of us in order to preserve what we conceive to be a law constitutionally framed and passed." The *Edwards* decision, more often referenced as *Edler v. Edwards,* has been cited by this Court frequently and favorably through the years in connection with its Article VI, Section 22, jurisprudence.

In *Marioneux v. Cutler,* 91 P. 355, 359 (Utah 1907), the Court seems to forbid second titles which, through a statement of intention or clarification, seek to avoid the constitutional proscription of Article VI, Section 22: "In conclusion, in order to avoid a misconception of the scope of this decision we remark that the Legislature may not disregard the constitutional provision requiring that no act shall contain 'more than one subject, which shall be clearly expressed in its title,' by simply making the legislative intention clear in the act itself."

particular.[30] The public, however, which will be less sophisticated in government affairs and potentially unfamiliar with the legislative process, easily may be mislead by confusions engendered under defendants' two title rule. Indeed, that probably did occur on the facts as alleged in our complaint. Even watchful members of the general public, those aware of the 4 non-budgetary bills which previously had failed, would not be looking for the revival and inclusion of those measures, by last minute legislative prestidigitation, in a bill entitled "Minimum School Program Budget Amendments." Their eyes, distracted by the appearance of a fiscal amendment in the official title, would have stopped there and not looked further to discover substantive measures – let alone such measures which had been defeated earlier in the session.

Indeed, as noted by the Court in *Jensen v. Matheson,* 583 P.2d 77, 80-81 (Utah 1978), "It hardly requires stating that there is a salutary purpose in the constitutional mandate of Section 22 . . . that the subject of each act shall be '*clearly expressed* in its title.' This is so the legislators [and public] will be

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[30] The clear title requirement has two beneficiaries, legislators and members of the public. As to the latter, the purpose of this constitutional mandate is "'fairly [to] apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon, by petition or otherwise, if they shall so desire[ ]'" [citation omitted]). *Baker v. Department of Registration,* 3 P.3d 1082, 1090 (Utah 1931).

Hence, the clear title requirement, with its fair notice element, buttresses an important policy in the state of Utah, namely, that "[c]itizen participation in legislative proceedings is absolutely vital to ensure a fully-informed and representative legislature." *Riddle v. Perry,* 40 P.3d 1128, 1132 (Utah 2002).

advised of the subject and purpose of the act in order that there be *no misunderstanding, omitting, nor burying or obscuring* of what is being proposed. It is for that same purpose and that the act will receive proper attention and consideration that the act is required to be read by title three times. If this procedure of reading by title has any useful purpose whatever, it should mean something more than designation by a mere identifying label. A fair and practical compliance with that mandate would mean by some title sufficiently descriptive to state the subject matter and generally how the act affects it." (Emphasis in original and supplied.)

X. CONCLUSION

Plaintiffs' complaint adequately alleges the elements of log-rolling pursuant to the single subject case law pertinent to Article VI, Section 22. Count one of the complaint, therefore, states a claim upon which relief may be granted under Rule 12(b)(6). The complaint sufficiently alleges the elements of an unclear title violation under Article VI, Section 22. Count two of the complaint, therefore, states a claim upon which relief may be granted under Rule 12(b)(6). The lower court's ruling to the contrary, resulting in a judgment dismissing counts one and two of the complaint, should be reversed. This case thereafter should be remanded

to the lower court for further pretrial proceedings and a trial on the merits of plaintiffs' claims.

Dated this 29th day of July, 2011.

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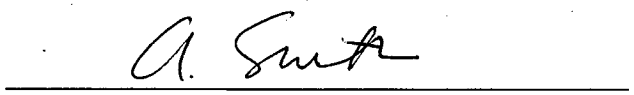
Attorney for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Plaintiffs'/Appellants' Opening Brief, together with a disk containing a pdf formatted electronic version of the same, was served this 29th day of July, 2011, by mailing copies of the same, first class mail, postage prepaid, addressed to counsel for defendants/appellees, Jerrold S. Jensen, Assistant Attorney General, and Brent A. Burnett, Assistant Attorney General, 160 East 300 South, 5th Floor, P. O. Box 140857, Salt Lake City, Utah 84114-0857.



Tab A

ADDENDUM A

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IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

Tom Gregory, Glen E. Brown,
A. Lamont Tyler, Marjorie Tuckett,
Teresa Theurer, Jordan Tanner,
Debbie Swenson, Carmen Snow,
Marilyn Shields, Pat Rusk,
Ronda Rose, Jack Redd,
Georgia Peterson, Carole Peterson,
Bonnie Palmer, Denis Morrill,
Bill Moore, Sarah Meier,
Rosalind McGee, Scott McCoy,
Sheryl Allen, Dee Burningham,
Kim Burningham, Carolyn White,
Michael Jensen, Steven O. Laing,
Judy Larson, Lisa Watts Baskin,
David Hogue, Rebecca Chavez-Houck,
Janice Fisher, Christine Johnson,
Beth Beck, Mike Marsh,
Karen Hale, Becky Edwards,
Janet Cannon, and Steven C. Baugh,

Plaintiffs,

vs.

Mark Shurtleff, in his official capacity as Attorney General for the state of Utah, Edward Alter, in his official capacity

COMPLAINT

Civil No. 080908814

Judge: Dever

as Treasurer for the state of Utah, and Jeff Herring, in his official capacity as Executive Director of the Utah Department of Human Resource Management,	)
Defendants.	)

Plaintiffs bring this action against defendants, seeking a judgment declaring that SB 2 (second substitute), a bill passed in the 2008 General Session of the Utah State Legislature, is unconstitutional in light of the requirements of Article VI, Section 22, and Article X, Section 3, of the Utah Constitution, as well as an injunction, blocking the implementation, funding, and enforcement of this legislation. For causes of action, plaintiffs show this Honorable Court as follows.

THE PARTIES, JURISDICTION, AND VENUE

1. Plaintiffs are a non-partisan coalition of citizen voters who believe that their elected representatives in the Utah State Legislature are the people's servants. Plaintiffs, moreover, are united by their concern that these representatives should conduct the people's business in an orderly, open, and ethical manner, consistent with those fundamental, mandatory, procedural constraints set forth in the Utah Constitution.

2. Plaintiffs are committed to the following elementary propositions. Good laws are a product of good lawmaking. Good lawmaking, at a minimum, is a process which insures -- through its transparency and fairness -- the participation of all citizens. Citizen participation, not only is a fundamental right, guaranteed by the Utah Constitution, but also is a procedural imperative if enacted laws are to reflect, through the mirror of representation, the will of the people. Concerned citizens cannot know how to direct their participation when legislative proposals are falsely named or otherwise disguised through

omnibus "Christmas Tree" bills and hydra-headed substitutions in the last hours of a legislative session. In this fashion, moreover, lawmakers grow deaf to the people's voice, and the will of the many may be denied or defeated through the parliamentary maneuverings of a few.

3. Each plaintiff is an individual, residing in the state of Utah. Each is a registered voter, taxpayer, and citizen of Utah. Plaintiffs include members of both major political parties, Republican and Democrat. Their government service and (where appropriate) political affiliations are as follows.

4. Tom Gregory presently serves as a member of the Utah State Board of Education ("USBE"). The USBE is established pursuant to Article X, Section 3, of the Utah Constitution. Article X, Section 3, likewise provides that "[t]he general control and supervision of the public education system shall be vested" in the USBE. All members of the USBE are elected in non-partisan races to serve 4 year terms.

5. Glen E. Brown, a Republican, formerly served as Speaker of the House of Representatives in the Utah State Legislature.

6. A. Lamont Tyler formerly served as a Republican member of the House of Representatives in the Utah State Legislature.

7. Marjorie Tuckett currently is a member of the Board of Directors of the Utah School Boards Association ("USBA"). Founded in 1932, the USBA is an umbrella organization which represents all 40 school districts in the state of Utah. Ms. Tuckett serves in a non-partisan capacity with the USBA.

8. Teresa Theurer currently is a member of the USBE. This is a non-partisan office.

9. Jordan Tanner formerly served as a Republican member of the House of Representatives in the Utah State Legislature.

10. Debbie Swenson currently serves as a member of the Board of Directors of the USBA. Ms. Swenson serves in a non-partisan capacity with the USBA.

11. Carmen Snow formerly served as President of the Utah Chapter of the Parent Teacher Association ("PTA").

12. Marilyn Shields formerly served as a member of the USBE. As noted above, all USBE members are non-partisan.

13. Pat Rusk currently serves as the Executive Director of Utahns for Public Schools ("UTPS"), a non-partisan coalition of organizations seeking reform and improvements for public schools in the state of Utah. Ms. Rusk formerly has served as President of the Utah Education Association ("UEA").

14. Ronda Rose has served on the Utah State PTA Board for over 10 years, and she has served on local and regional PTA Boards since 1995.

15. Jack Redd formerly served as a Republican member and majority leader of the House of Representatives in the Utah State Legislature.

16. Georgia Peterson formerly served as a Republican member of the House of Representatives in the Utah State Legislature. Ms. Peterson also has served as a Commissioner on the Utah State Tax Commission.

17. Carole Peterson formerly served as Chief Clerk of the House of Representatives in the Utah State Legislature.

18. Bonnie Palmer formerly served (in a non-partisan capacity) as President of the USBA. She presently serves as Chairperson of the Executive Committee of UTPS.

19. Denis Morrill presently serves as a member of the USBE. As noted above, all service on the USBE is non-partisan in nature.

20. Bill Moore presently serves as a member of the Board of Directors of the USBA and as a member of the Davis County School Board. He formerly served as President of the USBA. All service on the USBA and local school boards is non-partisan in nature.

21. Sarah Meier presently serves as President of the Granite School Board and as a member of the Board of Directors of the USBA. She formerly served as President of the USBA. Her service on the USBA and with the Granite School Board is non-partisan in nature.

22. Rosalind McGee presently serves as a Democratic member of the House of Representatives in the Utah State Legislature.

23. Scott McCoy presently serves as a Democratic member of the Senate in the Utah State Legislature.

24. Sheryl Allen presently serves as a Republican member of the House of Representatives in the Utah State Legislature.

25. Dee Burningham is registered to vote as a Republican. He formerly served as the political director of the UEA.

26. Kim Burningham presently serves as a member of the USBE. He formerly served as Chairperson of the USBE. All such service, as noted above, is non-partisan in character. Prior to such service, he was a Republican member of the House of Representatives in the Utah State Legislature.

27. Carolyn White currently is a non-partisan member of the Board of Directors of the USBA.

28. Michael Jensen presently serves (in a non-partisan capacity) as a member of the USBE.

29. Steven O. Laing formerly served as the State Superintendent of Public Instruction for the state of Utah. Pursuant to the provisions of Article X, Section 3, of the Utah Consitution, the USBE appoints the state superintendent who then becomes "the executive officer of the board." As an appointee of the USBE, the state superintendency is non-partisan in nature.

30. Judy Larson formerly served (in a non-partisan capacity) as a member of the USBE.

31. Lisa Watts Baskin presently serves as a Councilperson on the City Council for North Salt Lake. She formerly has served as an attorney in the Office of Legislative Research and General Counsel.

32. David Hogue formerly served as a Republican member of the House of Representatives in the Utah State Legislature.

33. Rebecca Chavez-Houck presently serves as a Democratic member of the House of Representatives in the Utah State Legislature.

34. Janice Fisher presently serves as a Democratic member of the House of Representatives in the Utah State Legislature.

35. Christine Johnson presently serves as a Democratic member of the House of Representatives in the Utah State Legislature.

36. Beth Beck is a retired school administrator and a former President of the UEA.

36a. Mike Marsh presently serves (in a non-partisan capacity) as a member of the Board of Directors of the USBA.

37. Karen Hale formerly served as a Democratic member of the Senate in the Utah State Legislature.

38. Becky Edwards is a long-time community advocate for education and family health issues.

39. Janet Cannon presently serves in a non-partisan capacity as a member of the USBE.

40. Steven C. Baugh formerly served as Superintendent of the Alpine School District. He is an associate professor of educational leadership at the university level in the state of Utah.

41. As noted above, all plaintiffs are concerned with the openness, fairness, and integrity of the process by which the Utah State Legislature enacts legislation and the extent to which that process, if constitutionally impaired, impacts their ability, as representatives, senators, education officials, or constituents, to affect that process. All aver that their ability to have input in and impact upon the various bills which became SB 2 (second substitute) in fact was impaired, if not thwarted, in view of the process which the Utah State Legislature followed in enacting that particular legislation.

42. Plaintiffs who are elected or appointed as legislators or officials have taken an oath under Article IV, Section 10, of the Utah Constitution. This oath requires them, among other things, to "support, obey and defend . . . the Constitution of this State," and

to "discharge the duties of my office with fidelity." These plaintiffs feel bound by their oath to bring the instant action.

43. Defendants are the Utah state officials primarily charged with funding, implementing, administering, and enforcing the provisions of SB 2 (second substitute). Each defendant is sued in his official capacity for the purpose of obtaining declaratory and injunctive relief.

44. Pursuant to the provisions of title 78 of the Utah Code, this Court has subject-matter jurisdiction over the claims asserted in this civil action. Based upon the claims which are set forth below, and pursuant to Utah Code, Sections 78-33-1, *et seq.*, as well as Rule 57, Utah Rules of Civil Procedure, plaintiffs are entitled to a judgment declaring that SB 2 (second substitute) (or a portion thereof) is unconstitutional, invalid, ineffective, and unenforceable. Based upon the claims which are set forth below, and pursuant to Rule 65, Utah Rules of Civil Procedure, plaintiffs are entitled to an injunction (preliminarily and/or permanently) which restrains defendants from enforcing, implementing, or administering (through the disbursement of funds or otherwise) the provisions of SB 2 (second substitute) (or a portion thereof).

45. Pursuant to the provisions of title 78 of the Utah Code and Rule 4 of the Utah Rules of Civil Procedure, this Court has personal jurisdiction over each defendant in this civil action.

46. Pursuant to the provisions of title 78 of the Utah Code, the venue for this civil action properly is laid in this Court.

BACKGROUND AVERMENTS

47. On March 5, 2008, the last day of the 2008 General Session, the Utah State Legislature enacted SB 2 (second substitute) (hereinafter called "SB 2" or the "Omnibus Bill").

48. Although SB 2 was titled simply "Minimum School Program Budget Amendments," the bill was an omnibus measure which cobbled together no fewer than 14 separate pieces of legislation, relatively few of which dealt with the "Minimum School Program Budget" referenced in the title.

49. The legislative measures which became SB 2 had been introduced as no fewer than 14 separate bills with single subjects during the course of the 2008 General Session, demonstrating a legislative judgment that each of these 14 bills should be reviewed, debated, and voted upon according to their individual merits independently of any other item of legislation or legislative agenda.

50. Further demonstrating this legislative judgment, all but one of these 14 bills in fact were reviewed, debated, and voted upon according to their individual merits prior to their amalgamation into the Omnibus Bill. In this regard, and subject to further discovery, plaintiffs tentatively have reconstructed the legislative record which, to the best of their understanding at present, shows the following.

Fourteen Bills Introduced and Considered as Single Subjects

51. **HB 67 – Extended Year for Special Educators.** Lines 865 to 911 of SB 2 initially were introduced as a single subject as HB 67 on January 21, 2008. When introduced as a single subject, this bill was titled "Extended Year for Special Educators." A House committee reported favorably on the bill by a vote of 11 to 0 on January 25,

2008. The bill passed the House by a vote of 62 to 0 on January 30, 2008, after which it was forwarded to the Senate. A Senate committee reported favorably on the bill by a vote of 4 to 0 on February 7, 2008. The Senate passed the bill by a vote of 22 to 0 on February 14, 2008. Even though the bill had passed both houses, however, it was not forwarded to the governor for his signature. Instead, and apparently in contravention of the Rules of the Fifty-Seventh Legislature (updated as of January 2, 2008), it was held in abeyance and ultimately rolled into and enacted as part of the Omnibus Bill.

52. **HB 200 – Early Childhood Learning and Evaluation.** Lines 259 to 399 of SB 2 initially were introduced as a single subject as HB 200 on February 28, 2008. When introduced as a single subject, this bill was titled "Early Childhood Learning and Evaluation." A House committee reported favorably on the bill by a vote of 10 to 2 on February 18, 2008. But after being replaced with HB 200 (first substitute) on the House floor, it was disapproved by the entire House by a vote of 31 to 37 on February 29, 2008. Although the Rules of the Fifty-Seventh Legislature (updated as of January 2, 2008) required that motions for reconsideration be made and heard, if at all, within 24 hours of a bill's defeat on the House floor, there was no motion for reconsideration of the negative vote on HB 200. This bill achieved passage only because it ultimately was rolled into and enacted as part of the Omnibus Bill.

53. **HB 212 – State System of Public Education Amendments or Educator Salary Adjustments.** Lines 718 to 772 of SB 2 initially were introduced as a single subject as HB 212 [which became HB 212 (second substitute)] on February 12, 2008. When proposed as a single subject, the bill was titled "State System of Public Education Amendments." A substitute bill, also proposed as a single subject, was titled "Educator

Salary Adjustments." A House committee reported favorably on the bill by a vote of 15 to 0 on February 15, 2008. The bill passed the House by a vote of 66 to 0 on February 22, 2008, after which it was sent to the Senate and held in abeyance until ultimately rolled into and enacted as part of the Omnibus Bill.

54. **HB 266 – Accelerated Learning Program Revisions.** Lines 534 to 602 and 622 to 624 of SB 2 initially were introduced as a single subject as HB 266 on January 21, 2008. When introduced as a single subject, this bill was titled "Accelerated Learning Program Revisions." A House committee reported favorably on the bill by a vote of 11 to 1 on January 30, 2008. The House passed the bill by a vote of 72 to 0 on February 8, 2008, after which it was sent to the Senate. But the bill stalled in the Senate, failing of recommendation on account of a tied committee vote. The bill ultimately was rolled into and enacted as part of the Omnibus Bill.

55. **HB 270 – Utah Science Technology and Research Initiative Centers.** Lines 912 to 965 of SB 2 initially were introduced as a single subject as HB 270 on January 21, 2008. When introduced as a single subject, this bill was titled "Utah Science Technology and Research Initiative Centers." A House committee reported favorably on the bill by a vote of 10 to 0 on January 25, 2008. The House passed the bill by a vote of 73 to 0 on January 31, 2008, after which it was forwarded to the Senate. A Senate committee reported favorably on the bill by a vote of 3 to 0 on February 6, 2008. The Senate passed the bill by a vote of 22 to 1 on February 14, 2008. Nevertheless, the bill was not forwarded to the governor for his signature. Instead, and apparently in contravention of the Rules of the Fifty-Seventh Legislature (updated as of January 2,

2008), the bill was held in abeyance and ultimately rolled into and enacted as part of the Omnibus Bill.

56. **HB 278 – Charter School Funding Amendments.** Lines 95 to 258 and 603 to 621 of SB 2 initially were introduced as a single subject as HB 278 on January 28, 2008. When introduced as a single subject, this bill was titled "Charter School Funding Amendments." Although reported favorably by a House committee vote of 8 to 1 on February 18, 2008, the bill failed of passage in the House by a vote of 33 to 41 on February 25, 2008. A motion for reconsideration of HB 278 as a single subject may have been entertained as allowed pursuant to the legislative rules. Nevertheless, the bill ultimately was rolled into and obtained enactment as part of the Omnibus Bill.

57. **HB 329 – High-ability Student Initiative Program.** Lines 966 to 1005 of SB 2 initially were introduced as a single subject as HB 329 on January 25, 2008. When introduced as a single subject, this bill was titled "High-ability Student Initiative Program." A House committee reported favorably on the bill by a vote of 11 to 1 on February 18, 2008. The bill passed the House by a vote of 64 to 0 on February 25, 2008, and was sent to the Senate. It was held in the Senate and ultimately rolled into and enacted as part of the Omnibus Bill.

58. **HB 363 – Public Education-Arts Enhanced Learning Program or Beverley Taylor Sorenson Elementary Arts Learning Program.** Lines 1029 to 1060 of SB 2 initially were introduced as a single subject as SB 363 [which later became SB 363 (first substitute)] on February 1, 2008. When introduced as a single subject, this bill was titled "Public Education – Arts Enhanced Learning Program." A substitute bill, also submitted as a single subject, was titled the "Beverley Taylor Sorenson Elementary Arts

Learning Program." A House committee reported favorably on the bill by a vote of 10 to 0 on February 13, 2008. The bill passed the House by a vote of 71 to 0 on February 21, 2008, and was sent to the Senate where it was held and ultimately rolled into and enacted as part of the Omnibus Bill.

59. **HB 419 – Public Textbook Evaluation Amendments.** Lines 468 to 491 of SB 2 initially were introduced as a single subject as HB 419 on February 12, 2008. When introduced as a single subject, this bill was titled "Public School Textbook Evaluation Amendments." A House committee reported favorably on the bill by a vote of 9 to 0 on February 25, 2008. The bill ultimately was rolled into and enacted as part of the Omnibus Bill.

60. **HB 436 – English Language Learner Family Literacy Centers Program.** Lines 1006 to 1028 of SB 2 initially were introduced as a single subject as HB 436 February 6, 2008. When introduced as a single subject, this bill was titled "English Language Learner Family Literacy Centers Program." A House committee reported favorably on the bill by a vote of 10 to 0 on February 22, 2008. The House passed the bill by a vote of 55 to 9 on February 27, 2008. The bill thereafter was forwarded to the Senate and ultimately rolled into and enacted as part of the Omnibus Bill.

61. **SB 35 – Differentiated Pay for Teachers.** Lines 773 to 864 of SB 2 initially were introduced as a single subject as SB 35 [which later became SB 35 (second substitute)] on January 21, 2008. When introduced as a single subject, this bill and its substitute were titled "Differentiated Pay for Teachers." It was reported favorably out of a Senate Committee by a vote of 5 to 1 on January 22, 2008. It passed the Senate by a vote of 19 to 7 on February 5, 2008. It then was forwarded to the House where it may

have died on a tie vote in Committee February 27, 2008. In any event, SB 35 ultimately was rolled into and enacted as part of the Omnibus Bill.

62. **SB 61 – Financial and Economic Literacy Education.** Lines 400 to 467 of SB 2 initially were introduced as a single subject as SB 61 on January 21, 2008. When introduced as a single subject, this bill was titled "Financial and Economic Literacy Education." It was reported favorably out of committee by a vote of 7 to 0 on January 28, 2008. It was passed by the Senate by a vote of 24 to 0 on February 2, 2008. It then was forwarded for consideration by the House. It was reported favorably out of committee in the House by a vote of 11 to 0 on February 18, 2008. The bill thereafter was held in abeyance until rolled into and enacted as part of the Omnibus Bill.

63. **SB 118 – Education Transportation Amendments.** Lines 635 to 717 of SB 2 initially were introduced as a single subject as SB 118 on January 21, 2008. When introduced as a single subject, this bill was titled "Education Transportation Amendments." It was reported favorably out of committee by a vote of 5 to 0 on January 24, 2008. The Senate passed the bill by a vote of 26 to 0 on February 5, 2008. It was sent to the House February 5, 2008. It was reported favorably out of committee by a vote of 12 to 0 on February 18, 2008. The bill thereafter was held in abeyance for a month until it was rolled into and enacted as part of the Omnibus Bill.

64. **Sections 12, 13, and Uncodified Sections of SB 2.** Plaintiffs are unsure of the origins of lines 492 to 533 and 603 to 621 and 1072 to 1155 of SB 2. Plaintiffs are certain, however, that these are appropriations measures or measures related to appropriations. This is the money that was intended, among other purposes, to fund the so-called Minimum School Program looking to the future. These portions of SB 2

sometimes hereafter, for convenience of reference, will be called the "money bill" or words to that effect. This money bill, in effect, was held in abeyance and not distributed for consideration until March 4, 2008, one day prior to the end of the legislative session. After distribution, it passed both houses of the legislature as part of the Omnibus Bill.

65. Plaintiffs aver that, since each of the bills noted above was introduced as a single subject, and since each was reviewed, debated, and considered by either or both houses of the state legislature as a single subject, this course of dealing establishes a legislative judgment that each bill in fact was a single subject which should have been considered individually on its own merits and not in combination with other bills.

The Hostage Bills

66. Several of the bills referenced above were enormously popular as independent measures. Indeed, passage of these bills, in view of the perceived need for reform efforts in public education, was considered by many to be a legislative imperative. Included in this category were bills such as HB 67, HB 212, HB 270, SB 118, and, of course, the money bill.

67. As expected, several of these bills passed both houses of the state legislature as single subjects. These approvals occurred unanimously or by overwhelming majorities. These included HB 67 and HB 270, both of which had cleared both houses no later than February 14, which was 19 calendar days and 14 legislative days before the session ended.

68. Still other bills passed at least one house and had received committee approval for passage in another house. These approvals occurred unanimously or by overwhelming majorities. These included SB 61 which passed the Senate February 2 and

obtained committee approval in the House February 18, and SB 118 which passed the Senate February 5 and received committee approval in the House February 18, which was 16 calendar days and 12 legislative days before the session ended.

68a. The relatively early dates of passage by one or both houses for bills such as HB 67, HB 270, SB 61, and SB 118 suggest a deliberate intent by a small group of insider legislators to interrupt the normal flow of bill consideration with respect to these measures for the express purpose of holding them hostage.

69. And still another set of bills passed at least one house by unanimous vote or overwhelming majority and then was held in abeyance until ultimately becoming part of the Omnibus Bill. These included HB 212 which passed the House February 15, HB 329 which passed the House February 25, and HB 436 which passed the House February 27. As with the bills noted above in the immediately preceding paragraph of this complaint, the relatively early passage of HB 212 in particular reinforces the impression of hostage holding by an insider group.

70. Finally, the money bill, although contemplated for passage early in the session, was not distributed for consideration until March 4, when it promptly became the linchpin and centerfold for the Omnibus Measure which was enacted as SB 2.

71. Plaintiffs aver that these popular bills were used as hostages to obtain passage of less popular or unpopular bills, bills that, but for the hostage bills, did not or could not have obtained passage if considered alone and on the basis of their individual merits. As noted above, these so-called hostage bills, although they had passed (or could quickly have been passed) by both houses of the state legislature, deliberately were not forwarded to the governor for signature or otherwise were held in abeyance so that they could serve

as hostages in order to extort enactment of the less popular or unpopular bills referenced below. On information and belief, plaintiffs aver that the bills described above as hostage bills deliberately were held back so that they could be used as hostages to extort or compel enactment of the less popular bills described below.

The Price for Release of the Hostages

72. As indicated above, other bills were less popular or decidedly unpopular. These included HB 278 which was voted down (33-41) in the House February 29, HB 200 which was defeated (31-37) in the House February 29, and HB 266 which, although passing in the House, could not get out of committee in the Senate. These also may have included SB 35 which, although passing the Senate on February 5, may have died in a House committee on February 27. None of these bills could obtain passage by the constitutionally required majorities of both houses of the state legislature when viewed independently on their own merits. All achieved passage only because they were combined with the popular bills that were rolled into and enacted as part of the Omnibus Bill.

Unclear Title Problems

73. SB 2, as noted above, is titled "Minimum School Program Budget Amendments." This title is misleading for the following reasons which are meant to be illustrative and not exhaustive.

74. SB 2 is an Omnibus Bill, containing at least 14 separate bills, only a portion of which treats the so-called Minimum School Program. SB 2's title falsely implies that SB 2 treats only the Minimum School Program and not other subjects.

75. SB 2's title falsely implies that the bill is confined to budgetary questions whereas many of the bills which are incorporated into SB 2 treat substantive, statutory policy issues, as distinct from fiscal issues.

76. SB 2's title falsely implies that it is amendatory in nature, amending existing statutes, whereas many of the bills which are incorporated into SB 2 enact entirely new legislation which in turn establish brand new programs.

77. SB 2's title misleadingly fails to inform legislators and the public that certain bills which had failed of passage in either the House or the Senate during the course of the session have been rolled into this Omnibus Measure.

78. Some of the titles by which the individual bills comprising SB 2 were introduced and tracked through the course of the session were confusingly altered when these bills were rolled into and considered as part of SB 2. For example, SB 35 was known as the "Differential Pay for Teachers" bill throughout the session, but became the "Teacher Salary Supplement Program," an entirely different name with a distinctive meaning, when enacted as lines 774 to 864 of SB 2.

COUNT ONE: THE OMNIBUS BILL VIOLATES

THE SINGLE SUBJECT REQUIREMENT

OF ARTICLE VI, SECTION 22,

OF THE UTAH CONSTITUTION

79. In light of the facts set forth above and below, the Omnibus Bill violates the single subject requirement of Article VI, Section 22, of the Utah Constitution, which provides, in pertinent part, that, "Except general appropriations bills and bills for the

codification and general revision of laws, no bill shall be passed containing more than one subject, which shall be clearly expressed in its title."

80. Article VI, Section 22, is a mandatory limitation on legislative power, and, in particular, the process by which the legislature exercises power in the consideration and enactment of legislation.

81. By passing the Omnibus Bill, the legislature violated Article VI, Section 22, in at least 3 distinct respects. A violation in even one of these respects, standing alone, however, would be sufficient to warrant a judgment that the Omnibus Bill is unconstitutional pursuant to Article VI, Section 22.

The First Respect in Which the Omnibus Bill

Violates the Single Subject Requirement of Article VI, Section 22.

82. What is a "single subject" for purposes of Article VI, Section 22? Whether the Omnibus Bill treats a single subject or multiple subjects is to be determined in light of the purpose which the framers intended to be served when they passed Article VI, Section 22. That purpose is to prevent parliamentary maneuverings whereby any bill, so unpopular that it could not pass on its own merits when standing alone, is bundled with popular measures in order to extort enactment of the unpopular measure. When this occurs, the single subject rule of Article VI, Section 22, is offended.

83. The averments in this complaint amply demonstrate that this occurred through the passage of the Omnibus Bill. In particular, and without limiting the foregoing, plaintiffs point the Court to statements made by a member of the legislature in the wake of SB 2's passage. Michael Waddoups, the Republican Senator from District 6, issued a written statement to all delegates at the Salt Lake County Republican Convention on or

about May 10, 2008. The statement reads, in pertinent part, "This funding bill [SB 2] was presented to the legislature the day before the session ended leaving no time to debate the bill and rewrite a new one. It was put together by House and Senate Leadership. This is not the way funding is traditionally handled. I thought it was wrong then and I still think it was wrong. However, I, along with almost every other legislator, voted for it because we were faced with the problem that school funding was included in this bill. Had we not voted for the bill education would have remained unfunded. Many of the senators were upset about it and we are currently in the process of seeing it never happens again."

84. Demonstrating the same point in a different way, at the most recent meeting of the Interim Education Committee, on or about May 21, 2008, the wisdom (and the constitutionality) of a portion of SB 2, namely, the International Baccalaureate Program, was challenged. Stephen Urquhart, the Republican representative from St. George, approved the carving out of the IB portion of SB 2 for constitutional review by the committee staff, stating that, "I think with an ongoing appropriation, it's fully appropriate to see if we want to continue to make that appropriation *on a bill that failed to make it through the process[.]*" (Emphasis supplied.)

The Second Respect in Which the Omnibus Bill

Violates the Single Subject Requirement of Article VI, Section 22.

85. What is a "single subject" for purposes of Article VI, Section 22? When any bill combines appropriations measures with general legislation, this is a *per se* violation of the "single subject" requirement of Article VI, Section 22. This is because, consistent with the first respect in which the Omnibus Bill violates the single subject requirement,

money bills, which are critical for government funding, and which usually are subject to passage in the last hours of a legislative session, too easily are taken hostage for the purpose of extorting passage of otherwise unpopular measures. The averments in this complaint, especially Senator Waddoups's statement in this regard, amply demonstrate that this occurred through the passage of the Omnibus Bill.

The Third Respect in Which the Omnibus Bill

Violates the Single Subject Requirement of Article VI, Section 22.

86. What is a "single subject" for purposes of Article VI, Section 22? Under the single subject rule, bills may combine measures which are related historically, instrumentally, or necessarily by subject-matter. But to say that SB 2 contains only a single subject because all of its provisions, in some way, however disjointedly, relate to matters of "education," in the end, proves too much. We could just as well say that all legislation is related to the business of "government," thereby easily circumventing the constitutional proscription of Article VI, Section 22. The "single subject" principle of Article VI, Section 22, must be applied meaningfully so that legislative abuses do not become the exceptions which swallow the rule.

87. In this regard, the Omnibus Bill did not treat a single, related subject area for the following reasons which are meant to be illustrative and not exhaustive.

88. **Deference to the legislative judgment that SB 2 is an Omnibus Bill in violation of Article VI, Section 22.** Courts should not second-guess lightly the manner in which a legislature desires to conduct business. But what was the overwhelming weight of legislative judgment in this regard? Members of the Fifty-Seventh Legislature during the 2008 General Session, every man and woman in both House and Senate,

treated these 14 bills as separate measures, introducing, reviewing, debating, and voting on each according to its individual merits for 43 days of a 45 day session. This course of dealing establishes a well-nigh irrefutable presumption that, in this case, each of these 14 bills in fact was a single subject which should have been considered separately on its own merits and not in combination with other bills in SB 2, the Omnibus Bill. Only in the last hours of that session were the bills bundled into SB 2, and the vote on this Omnibus Bill, as Senator Waddoups indicated above and as plaintiff legislators will testify at the trial of this matter, was not a judgment about what constitutes a single subject for constitutional purposes, but rather a matter of expedience, if not exigency, to free the hostage bills and educational funding for the coming budgetary cycle.

89. **Deference to the USBE judgment that SB 2 is an Omnibus Bill in violation of Article VI, Section 22.** The USBE, as noted above, is the constitutionally established agency empowered with "general control and supervision of the public education system" for the state of Utah. After SB 2 was enacted and sent to Governor Huntsman, the USBE, by unanimous vote, sent the Governor a letter urging him to veto the Omnibus Bill. This correspondence argues, in effect, that SB 2, although nominally an "education" measure, contains disparate, unrelated subject matters within the education code and, thus, is an omnibus bill in violation of Article VI, Section 22. Hence, the constitutional entity with the greatest expertise in educational policy in the state of Utah views SB 2 as containing multiple rather than single subject matters within the meaning of Article VI, Section 22. This Article X determination, like the legislative judgment noted above, is entitled to considerable deference by the judicial branch in adjudicating the constitutionality of the Omnibus Bill.

90. **SB 2 in fact contains multiple, disparate subject matters in contravention of the constraints of Article VI, Section 22.** One yardstick for determining whether a particular bill contains multiple or single subjects is the codification of various subjects in the education code. Different subjects related to public education are treated and codified in separate chapters of that code. Hence, for example, the single subject of USBE governance is treated separately in one chapter and not intermingled with the different subject of core curricula which is partitioned in another chapter. SB 2 clearly offends the single subject rule when measured against the codification yardstick in the following particulars which are meant to be illustrative rather than exhaustive and which are not listed by order of importance.

91. SB 2 does an end-run around the education code, as well as Article X, Section 3, of the Utah Constitution, by having a non-education related department, the Department of Human Resource Management, administer questions respecting educator salaries.

92. SB 2 establishes a State governed, pre-school, home-school program for low-income families. Fee waivers for low-income students historically have been handled in local districts. Pre-schooling is outside the conventional mandate of Utah's constitutionally prescribed education system. Home-schooling, speaking conceptually, is treated as an exemption from the conventional requirements of that public education system. And, indeed, the UPSTART portion of the Omnibus Bill is codified in that separate chapter of the education code which treats alternatives to public education.

93. Portions of the Omnibus Bill treat textbooks and instructional materials. These subjects historically have been dealt with in a separate chapter of the education code.

94. Portions of the Omnibus Bill create an English Language Learner Family Literacy Center Program to be administered by local school boards. The jurisdiction of local school boards over various programs is a matter of separate codification in chapter 3 of the education code. SB 2, however, rolls this particular measure into the Minimum School Program Act which is codified in chapter 17 of the education code.

95. Portions of the Omnibus Bill treat the so-called Minimum School Program. The Minimum School Program is a term of art which separately is codified in the education code. The nature and scope of the Minimum School Program have been defined statutorily in chapter 17 of the education code. They also have been defined as a matter of historical legislative practice. SB 2 inserts several new, optional programs, such as the High Ability Student Initiative Program, into the middle of the Minimum School Program, in contravention of these statutory prescriptions and this historical practice.

96. In view of all of the foregoing considerations, plaintiffs aver that the Omnibus Bill is unconstitutional pursuant to the single subject requirement of Article VI, Section 22, of the Utah Constitution.

97. In the alternative, those portions of the Omnibus Bill which clearly offend the single subject requirement (which portions, subject to final proof, may include HB 200, HB 266, HB 278, and SB 35) should be severed from SB 2 for the purpose of making a constitutional adjudication of the legislation in this case.

98. The Omnibus Bill (or a severed portion of SB 2) should be declared unconstitutional as violative of the single subject requirement of Article VI, Section 22, of the Utah Constitution.

99. Because the Omnibus Bill (or a severed portion of SB 2) is unconstitutional, defendants should be enjoined from enforcing, administering, implementing, or funding the relevant provisions of this legislation.

COUNT TWO: THE OMNIBUS BILL VIOLATES THE CLEAR TITLE REQUIREMENT OF ARTICLE VI, SECTION 22, OF THE UTAH CONSTITUTION

100. In light of the facts set forth above, the Omnibus Bill violates the clear title requirement of Article VI, Section 22, of the Utah Constitution.

101. In the alternative, those portions of the Omnibus Bill which plainly offend the clear title requirement (which may include, subject to proof, HB 200, HB 266, HB 278, and SB 35) should be severed from SB 2.

102. The Omnibus Bill (or a severed portion of SB 2) should be declared unconstitutional as violative of the clear title requirement of Article VI, Section 22, of the Utah Constitution.

103. Because the Omnibus Bill (or a severed portion of SB 2) is unconstitutional, defendants should be enjoined from enforcing, administering, implementing, or funding the relevant provisions of this legislation.

COUNT THREE: PORTIONS OF SB 2

VIOLATE THE NON-DELEGATION DOCTRINE

AND ARTICLE X, SECTION 3, OF THE UTAH CONSTITUTION

104. As noted above, SB 2 incorporates and enacts SB 35. SB 35 is found at lines 774 to 864 of SB 2. When introduced as a single subject, SB 35 was titled "Differentiated Pay for Teachers." When rolled into and enacted as part of SB 2, this legislation was re-named the "Teacher Salary Supplement Program."

105. SB 35 or lines 774 to 864 of SB 2 creates a program to supplement the salaries of eligible teachers under specified criteria.

106. Although nominally an "education program," SB 35 or lines 774 to 864 of SB 2 delegates administration of the new legislation to the Utah Department of Human Resource Management, and not to the Utah State Board of Education.

107. Article X, Section 3, of the Utah Constitution requires that education-related programs shall be administered by the Utah State Board of Education. This power of supervision and control is complete and exclusive.

108. SB 35 or lines 774 to 865 of SB 2 are unconstitutional in that they have delegated power to administer an educational program to the Utah Department of Human Resource Management, rather than to the Utah State Board of Education, all in violation of Article X, Section 3, of the Utah Constitution.

109. This Court should declare that SB 35 or lines 774 to 865 of SB 2 are an unconstitutional delegation of power in violation of Article X, Section 3, of the Utah Constitution.

110. This Court should enjoin the Utah Department of Human Resource Management from implementing or otherwise administering any aspect of SB 35 or lines 774 to 865 of SB 2.

COUNT FOUR: PORTIONS OF SB 2

VIOLATE THE NON-DELEGATION DOCTRINE

AND ARTICLE X, SECTION 3, OF THE UTAH CONSTITUTION

111. Section 11 of SB 2 requires an "independent party" (via private contract) to evaluate and map the alignment of public school instructional materials to the so-called core curriculum. These provisions of SB 2, moreover, forbid the Utah State Board of Education and other governmental entities from performing or supervising this work of evaluation and alignment.

112. Article X, Section 3, of the Utah Constitution requires that education-related programs shall be administered by the Utah State Board of Education. This power of supervision and control is complete and exclusive.

113. Section 11 of SB 2 is unconstitutional in that it delegates the power to administer an educational program to private, so-called "independent parties," while at the same time stripping the Utah State Board of Education of any supervisory control respecting such delegation, all in violation of Article X, Section 3, of the Utah Constitution.

114. This Court should declare that Section 11 of SB 2 is an unconstitutional delegation of power in violation of Article X, Section 3, of the Utah Constitution.

115. This Court should enjoin defendants from implementing or otherwise administering any aspect of Section 11 of SB 2.

REQUEST FOR RELIEF

Wherefore, having asserted the causes of action set forth above, plaintiffs ask the Court to enter an order in favor of plaintiffs and against defendants which order shall provide for the following relief.

a. A declaration of unconstitutionality (with or without severability) as set forth above.

b. An injunction (preliminary and/or permanent), prohibiting defendants or any of them from funding, implementing, administering, or enforcing any provisions of SB 2 which this Court has declared to be unconstitutional on any ground.

c. Attorneys fees and costs of court.

d. Such additional relief as the Court may deem equitable or appropriate under all of the facts and circumstances of this civil action.

Dated this 28th day of May, 2008.

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Tab B

ADDENDUM B

IN THE THIRD JUDICIAL DISTRICT, SALT LAKE COUNTY
STATE OF UTAH

TOM GREGORY, et al., Plaintiffs, vs. MARK SHURTLEFF, et al., Defendants.	**RULING** Case No. 080908814 Judge: L.A. DEVER

The above entitled matter is before the Court on Defendants' Motion to Dismiss Counts 1 and 2 of Plaintiffs' Complaint and Plaintiffs' Motion to Strike Evidentiary Matters. Having reviewed the Parties' Motions and Oppositions thereto, and, having heard oral arguments on the matter on March 26, 2009, the Court makes the following Ruling.

Background

Plaintiffs include various members of the Utah State Board of Education, Utah School Boards Association, Parent Teacher Association, Utah Education Association, former and current members of the State Legislature, and related groups. Plaintiffs seek a judgment from this Court declaring Senate Bill 2[1], a bill passed in the 2008

[1]The bill is entitled the Minimum School Program Budget Amendments. The bill:
(1) establishes the value of the weighted pupil unit at $2,577;
(2) establishes a ceiling for the state contribution to the maintenance and operations portion of the Minimum School Program for fiscal year 2008-09 of $2,495,183,979;

General Session as unconstitutional pursuant to Article VI, Section 22[2] and Article X,

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(3) modifies provisions related to the funding of charter schools;
(4) authorizes the use of appropriations for accelerated learning programs for International Baccalaureate programs;
(5) modifies the positions that qualify for educator salary adjustments and increases the salary adjustments for those positions;
(6) establishes and funds the following ongoing programs:
  (a) a pilot project using a home-based educational technology program to develop school readiness skills of preschool children;
  (b) a financial and economic literacy passport to track student mastery of certain concepts;
  (c) the Teacher Salary Supplement Program to provide a salary supplement to an eligible teacher; for special educators for additional days of work;
  (d) an optional grant program to provide an extended year for math and science teachers through the creation of Utah Science Technology and Research Centers;
  (e) the High-ability Student Initiative Program to provide resources for educators to enhance the academic growth of high-ability students; and
  (f) the English Language Learner Family Literacy Centers Program;
(7) makes one-time appropriations for fiscal year 2008-09 for:
  (a) pupil transportation to and from school;
  (b) the Beverley Taylor Sorenson Elementary Arts Learning Program to provide grants to integrate arts teaching and learning into selected schools; and
  (c) classroom supplies;
(8) requires the State Board of Education to allocate Minimum School Program nonlapsing balances to provide:
  (a) one-time signing bonuses for new teachers;
  (b) one-time performance-based compensation; and
  (c) a grant program to minimize the expenses of teachers to obtain the American Board Distinguished Teacher certification and to provide additional compensation to teachers who obtain that certification;
(9) provides a repeal date for certain pilot programs;
(10) makes nonlapsing appropriations; and
(11) makes technical corrections.

[2]"Every bill shall be read by title three separate times in each house except in cases where two-thirds of the house where such bill is pending suspend this requirement. Except general appropriation bills and bills for the codification and general revision of laws, *no bill shall be passed containing more than one subject, which shall be clearly expressed in its title*. The vote upon the final passage of all bills shall be by yeas and nays and entered upon the respective journals of the house in which the vote occurs. No bill or joint resolution shall be passed except with the assent of the majority of all the members elected to each house of the Legislature." (emphasis added).

Section 3[3] of the state constitution. (Compl., 2). The Motion before the Court relates specifically to Article VI, Section 22. Plaintiffs further seek an injunction blocking the implementation, funding, and enforcement of the legislation. Id.

Plaintiffs filed their Complaint because they are concerned with the openness, fairness, and integrity of the process by which the State Legislature enacts legislation and the extent to which that process, "if constitutionally impaired, impacts their ability, as representatives, senators, education officials, or constituents, to effect that process." Id. at 7. Plaintiffs assert the following causes of action: (1) The Omnibus Bill Violates the Single Subject Requirement of Article VI, Section 22; (2) The Omnibus Bill Violates the Clear Title Requirement of Article VI, Section 22; (3) Portions of SB 2 Violate the Non-Delegation Doctrine and Article X, Section 3; and (4) Portions of SB 2 Violate the Non-Delegation Doctrine and Article X, Section 3. Id. at 18-27.

Senate Bill Two's title references the Minimum School Program Act. The initial purpose of the Minimum School Program Act provided that the Act:

> Relates to public education. Provides for state and local funding of the minimum school program. Establishes the value of the weighted pupil unit. Requires school districts to impose a minimum basic tax rate. Provides for funding of school reform programs. Establishes distribution

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[3]"The general control and supervision of the public education system shall be vested in a State Board of Education. The membership of the board shall be established and elected as provided by statute. The State Board of Education shall appoint a State Superintendent of Public Instruction who shall be the executive officer of the board."

formulas. Provides for a contingency fund. Provides an appropriation for the school building supported program.

1991 Bill Tracking UT S.B. 196; see Utah Code Ann. § 53A-17a-102 (1991)[4]. The language of Section 53A-17a-102, addressing the purpose of the Minimum School Program Act, has not changed since 1991.

DEFENDANTS' MOTION TO DISMISS COUNTS 1 AND 2

Defendants explain that during the 2008 General Session, legislative leadership combined thirteen school funding bills receiving the highest prioritization by legislators with the school finance bill. (Defs.' Mem. In Supp., 2). Aside from the bill's short title, it has a long title found on lines eight through ninety-one of the enrolled bill. Id. Highlighted provisions of the long title include the sum proposed to be appropriated by the bill along with a description of the thirteen separately introduced bills. Id.; see Ex. A.

Defendants maintain that courts give wide latitude to the legislature as to what

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[4] Provides "(1) The purpose of this chapter is to provide a minimum school program for the state in accordance with the constitutional mandate. It recognizes that all children of the state are entitled to reasonably equal educational opportunities regardless of their place of residence in the state and of the economic situation of their respective school districts or other agencies.

(2) It further recognizes that although the establishment of an educational system is primarily a state function, school districts should be required to participate on a partnership basis in the payment of a reasonable portion of the cost of a minimum program.

(3) It is also the purpose of this chapter to describe the manner in which the state and the school districts shall pay their respective share of the costs of a minimum program. *This chapter also recognizes that each locality should be empowered to provide educational facilities and opportunities beyond the minimum program and accordingly provide a method whereby that latitude of action is permitted and encouraged.*" (emphasis added).

constitutes a single subject and clear title. Id. at 3. The Utah Supreme Court explained:

> Upon the question of titles to amendatory acts the cases are very numerous, but not always in strict harmony. The courts are, however, unanimous with respect to the following general rules to be observed: (1) That the constitutional provision now under consideration *should be liberally construed*; (2) that the provision should be applied so as *not to hamper the lawmaking power* in framing and adopting comprehensive measures covering a whole subject, the branches of which may be numerous, but where all have some direct connection with or relation to the principal subject treated; (3) that the constitutional provision should be so applied as to guard against the real evil which it was intended to meet; (4) that no hard and fast rule can be formulated which is applicable to all cases, but each must to a very large extent be determined in accordance with the peculiar circumstances and conditions thereof, and that the decisions of the courts are valuable merely as illustrations or guides in applying these general rules. Moreover, it is now established beyond question that unless the invalidity of a particular law in question is clearly and manifestly established the law must prevail as against such an objection. If, therefore, *by any reasonable construction*, the title of the act can be made to conform to the constitutional requirement, it is the duty of the courts to adopt this construction rather than another (if the title be open to more than one construction) which will defeat the act. (1 Lewis' Suth. Stat. Const. [2d Ed.], secs. 115-127, and cases there cited.) In case of doubt it must be assumed that the Legislature understood and applied the title so as to comply with the constitutional provision, and not contrary thereto. If, after applying such a reasonable construction the title is insufficient, or the subject is plural, then the law must fail. The provision is mandatory, and may not be ignored.

State ex rel. Edler v. Edwards, 95 P. 367, 368 (Utah 1908) (emphasis added).

The court further explained that the purpose of Article VI, Section 22, was to prevent the Legislature from "intermingling in one act two or more separate and *distinct* propositions--things which, in a legal sense, *have no connection* with, or proper relation

to, each other." Martineau v. Crabbe, 150 P. 301, 304 (Utah 1915)(emphasis added). It stated, "This requirement of singleness is not intended to embarrass honest legislation, but only to prevent the vicious practice of joining in one act incongruous and unrelated matters; and if all the parts of a statute have a natural connection and reasonably relate, directly or indirectly to one general and legitimate subject of legislation, the act is not open to the objection of plurality, no matter how extensively or minutely it deals with the details looking to the accomplishment of the main legislative purpose." Id. (quotation omitted); see also State v. Twitchell, 333 P.2d 1075, 1078 (Utah 1959) (holding that the title does not have to be an index to the act and, all that is required is that the subject matter of the act be reasonably related to the title and that all parts of the act be reasonably related to each other); State v. Kallas, 94 P.2d 414 (Utah 1939) (explaining that even though the original Liquor Control Act of 1935 Section 195 dealt with penalties and the amending section made no change to the penalty, the section did not violate the constitutional proscription because anything germane to the general subject expressed in the title of the original law, or that could have been included in the original law under its general title, could be included in a subsequent amendatory act); Globe Grain & Milling Co. v. Industrial Comm'n, 91 P.2d 512, 516 (Utah 1939) (explaining that the constitutional provision does not require that all the methods prescribed in the act for carrying out its objects be reflected in the title, nor all the classes affected by the act).

PLAINTIFFS' OPPOSITION

Plaintiffs assert that Senate Bill 2 ("SB 2") violates the single subject rule by bundling substantive law with budgetary amendments and appropriations measures. Plaintiffs maintain that SB 2 is the product of "log-rolling." They further maintain that the omnibus parts bear no relationship to each other because they are so disparate in subject matter, purpose and effect. Plaintiffs allege that agencies having nothing to do with education are identified in the omnibus bills. However, Plaintiffs' assertions reflect an incomplete representation.

For example, Plaintiffs claim that SB 2 provides for implementation and administration by agencies that have nothing to do with educational affairs, like the Utah Department of Human Resources. (Pls.' Opp., 10). This specific example falls under Section 53A-17a-156, Teacher Salary Supplement Program. (Def.'s Mem. In Supp. Ex. A, S.B. 2, 2008 Leg., Gen. Sess., lns. 771-850 (Utah 2008)). It should be noted that the aforementioned section is part of the Minimum School Program Act, which is the short title of SB 2 i.e. Minimum School Program Budgets Amendment. The relevant section of the statute provides:

> (4) The Department of Human Resource Management shall:
> (a) create an on-line application system for a teacher to apply to receive a salary supplement through the Teacher Salary Supplement Program;

(b) determine if a teacher:
(i) is an eligible teacher; and
(ii) has a course assignment as listed in Subsections (1)(a)(i)(A) through (D);
(c) verify, as needed, the determinations made under Subsection (4)(b) with school district and school administrators; and
(d) certify a list of eligible teachers and the amount of their salary supplement, sorted by school district and charter school, to the Division of Finance.
(5) (a) An eligible teacher shall apply with the Department of Human Resource Management prior to the conclusion of a school year to receive the salary supplement authorized in this section.

Utah Code Ann. § 53A-17a-156 (2008). It is reasonable to consider that this provision is consistent with the purpose of Minimum School Program Act Section 53A-17a-102(3), which provides in relevant part, "This chapter also recognizes that each locality should be empowered to provide educational facilities *and opportunities beyond the minimum program* and accordingly provide a method whereby that latitude of action is permitted and encouraged." See also supra n.4. As the Utah Supreme Court explained regarding Article VI, Section 22, "This requirement of singleness is not intended to embarrass honest legislation, but only to prevent the vicious practice of joining in one act incongruous and unrelated matters[.]" Martineau, 150 P. at 304 (citation omitted).

DISCUSSION AND ANALYSIS

Under Utah's liberal standard of notice pleading, a plaintiff is required to submit a "short and plain statement . . . showing that the pleader is entitled to relief" and "a

demand for judgment for the relief." Code v. Utah Dep't of Health, 2007 UT App 390, ¶ 4, 74 P.3d 1134, (internal citation omitted) (quoting Utah R. Civ. P. 8(a)(1)-(2)). The Utah Court of Appeals explained, "It is important to also note that the fundamental purpose of our liberalized pleading rules is to afford parties 'the privilege of presenting whatever legitimate contentions they have pertaining to their dispute,' subject only to the requirement that their adversary have 'fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.'" Zoumadakis v. Uintah Basin Med. Ctr., 2005 UT App 325, ¶ 3, 122 P.3d 891 (quotation omitted). A 12(b)(6) motion to dismiss concerns the sufficiency of the pleadings, *not the underlying merits* of a particular case. Tuttle v. Olds, 2007 UT App 10, ¶ 14, 155 P.3d 893 (citation omitted) (emphasis added). Furthermore the Utah Supreme Court stated, "[I]f there is any doubt about whether a claim should be dismissed for the lack of a *factual* basis, the issue should be resolved in favor of giving the party an opportunity to present its proof." St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 199 (Utah 1991) (citation omitted) (emphasis added).

Moreover, the United States District Court for the District of Utah explained:

> In considering a motion to dismiss under Rule 12(b)(6), all well-pleaded factual allegations, *as distinguished from conclusory allegations*, are accepted as true and viewed in the light most favorable to . . . the nonmoving party. [internal footnote omitted]. Plaintiff must provide "enough facts to state a claim to relief that is *plausible* on its face." [internal footnote omitted]. . . . But, the court "need *not accept conclusory*

> *allegations without supporting factual averments.*" [internal footnote omitted]. "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is *legally sufficient* to state a claim for which relief may be granted." [internal footnote omitted].

TecServe v. Stoneware, Inc., 2008 U.S. Dist. LEXIS 58929 (D. Utah Aug. 4, 2008) (emphasis added).

Plaintiffs do not present any factual allegations. Plaintiffs provide a history of the 2008 legislative session as it relates to SB2. (Compl. 9-18). While these are facts, they are insufficient to state a claim for relief. Plaintiffs provide no context for the Court to consider its factual review of the legislative session or its assertion of "the hostage bills." Plaintiffs statements are conclusory.

Their causes of action: (1) The Omnibus Bill Violates the Single Subject Requirement of Article VI, Section 22, and, (2) The Omnibus Bill Violates the Clear Title Requirement of Article VI, Section 22, are based on conclusory allegations, not facts. Plaintiffs are seeking a legal determination from this Court as to whether SB 2 complies with Article VI, Section 22 of the state constitution. "[A] plaintiff must 'nudge[ ][his] claims across the line from conceivable to plausible' in order to survive a motion to dismiss. Thus, the mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual

support for these claims." Id. (quotation omitted).

Conclusion

Based upon case law as discussed above, see supra pp. 4-6, and, Plaintiffs' failure to make anything other than conclusory allegations without support of factual averments, the Court GRANTS Defendant's Motion to Dismiss Counts I and II of Plaintiffs' Complaint.

PLAINTIFFS' MOTION TO STRIKE EVIDENTIARY MATTERS

The Plaintiffs filed a Motion to Strike Evidentiary Matters submitted by the Defendants in support of the Motion to Dismiss. The Plaintiffs correctly point out that evidentiary submissions are inappropriate under Rule 12(b)(6). The Court orders the evidentiary matters submitted by the Defendants to be stricken.

This Ruling serves as the ORDER OF THE COURT. No further order is required.

Dated 19th day of May, 2009.

BY THE COURT

L.A. DEVER
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing Ruling dated this 20 day of May, 2009, postage prepaid, to the following:

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Debbie Peterson
CLERK OF COURT

Tab C

ADDENDUM C

TecServe v. Stoneware, Inc., 2 08-CV-144 (UTDC)

TECSERVE, a Utah corporation dba Stoneware Partners and L. James Ellsworth, Plaintiffs,

v.

STONEWARE, INC., an Indiana corp., Defendant.

No. 2:08-CV-144 TS

United States District Court, District of Utah, Central Division

August 4, 2008

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS OR TRANSFER FOR IMPROPER VENUE AND TRANSFERRING CASE

TED STEWART United States District Judge

I. INTRODUCTION

These matters are before the court on Defendant Stoneware's Motion to Dismiss or, in the Alternative, to Transfer Venue on the basis that Plaintiff TecServe's claims were improperly filed in Utah rather than Indiana, and that Plaintiff Ellsworth's claim fails to state a claim on which relief can be granted.[1] The Court finds that TecServ's major claims and Plaintiff Ellsworth's sole claim are governed by a forum selection clause requiring they be brought in state or federal court in Indiana. Accordingly, the Court grants the Motion and transfers this case to the District of Indiana.

II. BACKGROUND

Plaintiff TecServ, Inc. is a Utah corporation with its principal place of business in Salt Lake City, Utah. Plaintiff L. James Ellsworth (Ellsworth) is TecServe's Chief Executive Officer (CEO) and is a resident of Salt Lake County, Utah. Defendant is Stoneware Inc. (Stoneware) an Indiana corporation with its principal place of business in Indianapolis, Indiana.

Stoneware is in the business of developing software. In 2007, TecServ entered into negotiations with Stoneware to acquire an ownership interest in its company. On June 21, 2007, TecServ and Stoneware entered into a non-binding letter of intent (LOI) outlining TecServ's proposal to purchase some or all of the capital stock of Stoneware. Among the terms of the LOI was one prohibiting Stoneware from hiring any new employees for a certain period of time.[2]

The parties' negotiations broke down and the parties ended their negotiations on August 27, 2007, by signing a Termination Agreement and Release (Termination Agreement). The Termination Agreement's "effective date" was August 27, 2007.[3] The Termination Agreement contains an integration clause rendering it "the entire agreement of the

parties concerning its subject mater."[4] On behalf of TecServ, Ellsworth conducted the negotiations leading to the Termination Agreement and signed the Termination Agreement as TecServ's CEO.

In addition, the Termination Agreement provides as follows:

> 2. *Release by TecServ.* TecServ hereby irrevocably and unconditionally releases and forever discharges Stoneware and its directors, shareholders, officers, representatives, employees, agents and assigns from any and all claims, debts, liabilities, demands, obligations, actions and causes of action (collectively, "Claims"), relating to the LOI and with respect to all periods on or before the Effective Date (whether or not such Claims are known or unknown, choate or inchoate).
>
> 3. *Complete Defense.* TecServ hereby (a) acknowledges and agrees that this Agreement shall be a complete defense to any Claim released under paragraph 2 above; (b) agrees not to pursue any Claim released under paragraph 2 above against Stoneware or any other persons released under paragraph 2 above; and (c) consents to entry of a temporary or permanent injunction to prevent or end the assertion of any such Claim.
>
> 8. *Applicable Law; Venue.* This agreement shall be governed by and construed in accordance with the laws of the state of Indiana, without regard to such jurisdiction's conflict of laws principles. Any action or proceeding seeking to enforce any provision of, or based on any right arising out of, this Agreement shall be brought against any of the parties in the courts of the State of Indiana, Marion County, or if it has or can acquire jurisdiction, in the United States District Court for the Southern District of Indiana (Indianapolis Division), and each of the parties consents to the jurisdiction of such courts (and of the appropriate appellate courts) in any such action or proceeding and waives any objection to venue laid therein.

In September of 2007, TecServ asserted the existence of an extra-contractual oral agreement between it and Stoneware that would allow TecServ to purchase Stoneware's stock. Tecserv alleges Ellsworth negotiated and entered into the alleged oral agreement on TecServ's behalf on August 16, 2007,[5] shortly before the parties entered into the Termination Agreement.

On September 17, 2007, Stoneware filed a declaratory judgment lawsuit in the United States District Court for the Southern District of Indiana in accordance with the forum-selection clause in the Termination Agreement (the Indiana Case). In the Indiana Case, Stoneware asserts its rights under the release and integration clauses of the Termination Agreement,[6] and also seeks to recover against TecServ on invoices for software and related services.[7] Stoneware did not serve TecServ in the Indiana Case within 120 days as required by Fed. R. Civ. P. 4(m).[8] On February 4, 2008, the Indiana court issued an Order to Show Cause why Stoneware's Complaint should not be dismissed for failure to serve TecServ. On February 21, 2008, TecServ moved to dismiss Stoneware's Indiana Complaint under Rule 4(m),[9] the Order to Show Cause was discharged,[10] and Stoneware filed its response in opposition to the motion to dismiss the Indiana case. That motion is pending in the Indiana Court.

On January 30, 2008, TecServ filed the current action in the Third Judicial District Court, for Salt Lake County, State of Utah. On February 21, 2008, Stoneware removed this action to this Court.

In the present action, TecServ brings the following claims against Stoneware: breach of contract; breach of

the implied covenant of good faith and fair dealing; specific performance; misappropriation, breach of fiduciary duty, determination of rights, and account in connection with an alleged partnership/joint venture; conversion based on misappropriation of accounts receivable; conversion of other property; misappropriation of trade secrets; unjust enrichment, and fraud in the inducement of the Termination Agreement. In addition, Plaintiff Ellsworth brings one claim for declaratory judgment against Stoneware.[11] Ellsworth's claim is based on the allegation that Stoneware and TecServe entered an oral agreement whereby Stoneware agreed to convey 10% of its stock to TecServe, "and/or its shareholders" and also gave TecServe "and/or its shareholders" an opportunity to acquire up to 25% more stock.[12]

Stoneware moves to dismiss TecServ's claims against it for two reasons: first, for improper venue based upon the venue selection clause; second, because Stoneware contends that the claims against it were compulsory counterclaims in the Indiana Action. Stoneware also moves to dismiss Ellsworth's claim against it for failure to state a claim upon which relief can be granted.

II. STANDARD

A party may move a court to dismiss an action based on "improper venue."[13] In the alternative, a court may also transfer the matter to a more appropriate venue, if it be in the interest of justice.[14] "A motion to dismiss based on a forum selection clause frequently is analyzed as a motion to dismiss for improper venue under Fed.R.Civ.P. 12(b)(3)."[15] Rule 12(b)(3) states that a party may move to dismiss the action for "improper venue."[16] If venue is improper, the court may either dismiss or, if it be in the interest of justice, transfer such case to the proper court where venue is appropriate.[17]

Stoneware also moves to dismiss Ellsworth's claim for the failure to state a claim under Fed. R. Civ. P. 12(b)(6). In considering a motion to dismiss under Rule 12(b)(6), all well-pleaded factual allegations, as distinguished from conclusory allegations, are accepted as true and viewed in the light most favorable to TecServ as the nonmoving party.[18] Plaintiff must provide "enough facts to state a claim to relief that is plausible on its face."[19] All well-pleaded factual allegations in the amended complaint are accepted as true and viewed in the light most favorable to the nonmoving party.[20] But, the court "need not accept conclusory allegations without supporting factual averments."[21] "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted."[22]

> However, the Supreme Court recently prescribed a new inquiry for us to use in reviewing a dismissal: whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." The Court explained that a plaintiff must "nudge[ ][his] claims across the line from conceivable to plausible" in order to survive a motion to dismiss. Thus, the mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims.[23]

III. DISCUSSION

TecServ does not dispute the validity of the venue provision; the issue is only whether it covers TecServ's claims against Stoneware. Stoneware contends that under the forum selection clause, or venue provision,[24] the only proper venue is Indiana. Stoneware contends that TecServ's claims fall under the forum selection clause, and would therefore require these claims to be adjudicated in the United States District Court for the Southern District of Indiana (Indianapolis Division).

Parties are free to contract into venue selections clauses, if they so choose.[25] Such clauses are *"prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances."[26] "Before [a] Court can make a determination regarding whether such a forum selection clause is valid or enforceable, it must first determine which agreement or agreements apply to this action as between the parties at bar."[27]

The Termination Agreement provides that it shall be construed and governed under Indiana law. Accordingly, the Court applies Indiana law to this motion to dismiss for improper venue based on the Termination Agreement's venue provision.[28]

Applying Indiana law, in the case *Dexter Axle Co. v. Baan USA, Inc.,* [29]the Indiana Court of Appeals adopted the Seventh Circuit's position that tort and statutory claims arising out of a contract are subject to that contract's forum selection clause:

> As for the fact that the defendants are charged with fraud rather than breach of contract, this can get the plaintiff nowhere in its efforts to get out from under the forum-selection clause. Not only does the clause refer to disputes concerning the contractual relationship between the parties, however those disputes are characterized. More important, a dispute over a contract does not cease to be such merely because instead of charging breach of contract the plaintiff charges a fraudulent breach, or fraudulent inducement, or fraudulent enforcement. The reason is not that contract remedies always supersede fraud remedies in a case that arises out of a contract; sometimes they do, sometimes they don't. It is that the existence of multiple remedies for wrongs arising out of a contractual relationship does not obliterate the contractual setting, does not make the dispute any less one arising under or out of or concerning the contract, and does not point to a better forum for adjudicating the parties' dispute than the one they had selected to resolve their contractual disputes.
>
> We completely agree with this analysis. Accordingly, [plaintiff's] tort and statutory claims that arise out of the Consulting Agreement are subject to the forum selection clause and must be litigated in California.[30]

Accordingly, the Court rejects TecServ's argument that its claims are outside the forum selection clause because TecServe has cast its claims as "non-contractual tort or statutory claims."[31] Instead, the Court examines whether the claims are within the scope of the forum selection clause, no matter how those claims are characterized in artful pleading.

TecServ contends that the venue provision does not apply because it is not "seeking to enforce any provision of the Termination Agreement and its claims are not "based on any right arising out of the Termination Agreement. Instead, TecServ agues it is seeking to enforce a separate oral agreement.

Stoneware contends that the venue provision covers any claim based on any right arising out of the Termination Agreement, including the release of all claims "related to" the LOI, "and with respect to all periods on or before" the August 27, 2007 effective date.

Because the Complaint alleges that the oral agreement was concluded on August 16, 2007—a date before the effective date of the Termination Agreement—any claim based on the alleged oral agreement constitutes a claim with respect to the period before the Termination Agreement's effective date. Further, TecServ's fraud in the inducement claim

alleges the purpose of the alleged false statements was to induce the signing of the Termination Agreement and thereby allow the hiring of certain employees.[32] This hiring was expressly prohibited by the LOI but expressly allowed under the Termination Agreement.[33] Similarly, TecServ alleges that a significant part of its consideration for the oral agreement was its agreement to terminate the LOI and allowing the hiring of those certain employees—rights only arising out of the Termination Agreement.[34]

The Court finds that resolution of these claims necessarily involves construing the Termination Agreement because, by its plain language, the Agreement covers all such claims. Accordingly, the Court finds that the claims herein alleging the existence of a separate oral agreement and alleging fraud in the inducement of the Termination Agreement arise out of termination agreement and therefore trigger its venue selection clause.[35]

The Utah cases cited by TecServ, *Sorenson v. Riffo,* [36]and *Energy Solutions, Inc. v. Connecticut Yankee Atomic Power Co.,* [37] are not to the contrary. Those cases apply Utah law, not Indiana law. Further, in *EnergySolutions,* the Court found that it was not necessary to adjudicate the rights of the parties under the contract containing the arbitration clause in order to resolve the claims in that case.[38] Thus, because the contract was "not materially relevanfto the resolution of the claims in *EnergySolutions,* that contract's forum selection clause was "not triggered"[39] a very different situation than the present case.

The Court finds that under Indiana law, Ellsworth's claims are also subject to the forum selection clause. "[C]ourts in this country . . . enforce forum selection clauses in favor of non-parties 'closely related' to a signatory."[40] "In order to bind a non-party to a forum selection clause, the party must be 'closely related to the dispute such that it becomes 'foreseeable' that it will be bound.[41]

The Complaint alleges it was Stoneware and TecServ that made the oral agreement.[42] Under the facts as alleged in the Complaint, Ellsworth, as a shareholder, is a third-party beneficiary of TecServe's alleged oral agreement between TecServe and Stoneware. Such third-party beneficiaries "of a contract would, by definition, satisfy the 'closely related' and foreseeability' requirements'" imposed by courts for binding non-signatories to a forum selection clause.[43] Because the forum selection clause applies to TecServ's claims based upon the alleged oral agreement, it also binds Ellsworth's claim, as a third-party beneficiary to the alleged agreement, for declaratory judgment on the alleged oral agreement.

Further, even if TecServe's and Ellsworth's claims were not subject to the venue selection provision, this case would not proceed in this district due to the first-to-file rule. Under the first-to-file rule "where two courts have concurrent jurisdiction, generally the first court in which jurisdiction attaches has priority to consider the case."[44] The Court finds none of the exceptions to the first filed rule apply to this case.[45] Under the rule, the Indiana Court has priority to consider the case and this Court would decline jurisdiction even absent the venue selection clause.

Further, the existence of the venue selection clause in this case shows the wisdom behind the first-to-file rule because "[a] party to a forum selection clause may not raise in a different forum, even as a compulsory counterclaim, a dispute within the scope of that clause."[46] Thus, Stoneware could not enforce the Termination Agreement's release and defense clauses or otherwise rely on its rights arising out of the Termination Agreement as a counterclaim in this forum. It would be barred by the forum selection clause from doing so even if those rights would otherwise be compulsory counterclaims herein.[47]Because Stoneware may not rely on or enforce its rights under the Termination Agreement's release clause in this venue, the compulsory counterclaim rule, and its issue preclusion effect, would not apply to those compulsory counterclaims.[48] As noted above, Stoneware has already affirmatively asserted its rights under the Termination Agreement in the Indiana Case.[49] As a result of the venue selection clause's restrictions on Stoneware, the

failure to apply the first-to-file rule in this case would result in duplicative proceedings and may well result in inconsistent rulings.

Because the Court is ruling on the basis of the forum selection clause, the Court need not address Stoneware's arguments that Ellsworth's claims should be dismissed under Rule 12(b)(6) or its arguments that the claims herein are compulsory counterclaims in the Indiana case. In view of the forum selection clause, those arguments are more appropriately addressed to the Indiana court.

IV. ORDER

Based on the foregoing, t is therefore

ORDERED that Stoneware's Motion to Dismiss or, in the Alternative, to Transfer Venue (Docket No. 8) is GRANTED. It is further

ORDERED that the hearing set for September 5, 2008, at 2:00 p.m. is VACATED. It is further

ORDERED that this case be transferred to the United States District Court for the Southern District of Indiana (Indianapolis Division).

Notes:

[1] Docket No. 8.

[2] Docket No. 11-2, LOI, ¶ 6(v).

[3] Docket No. 9-2, (Termination Agreement) at 1.

[4] *Id.* at ¶ 5.

[5] Complaint, at ¶¶ 27, 30-33.

[6] Docket No. 9-6 (complaint in Indiana case), ¶¶ 16-17, 21, 24, 27-29.

[7] *Id.* at ¶¶ 11-13, 18-19, and 30-32.

[8] Fed. R. Civ. P. 4(m).

[9] *Id.*

[10] Docket No. 11, Ex. C, at 2 (copy of docket sheet for Indiana Case).

[11] "Complaint, at ¶¶ 87-89 (eighth cause of action).

[12] *Id.* at ¶ 32.

[13] Fed. R. Civ. P. 12(b)(3).

[14] 28 U.S.C. § 1406(a).

[15] *Riley v. Kingsley Underwriting Agencies, Ltd.,* 969 F.2d 953, 956 (10th Cir. 1992).

[16] Fed. R. Civ. P. 12(b)(3).

[17] 28 U.S.C. § 1406(a).

[18] *Ruizv. McDonnell,* 299 F.3d 1173, 1181 (10th Cir. 2002).

[19] *Bell Atlantic Corp. v. Twombly,* U.S., 127 S.Ct. 1955, 1974 (2007) (dismissing complaint where Plaintiffs "have not nudged their claims across the line from conceivable to plausible").

[20] *GFF Corp. v. Associated Wholesale Grocers, Inc.,* 130 F.3d 1381, 1384 (10th Cir. 1997).

[21] *Southern Disposal, Inc., v. Texas Waste,* 161 F.3d 1259, 1262 (10th Cir. 1998); *Hall v. Bellmon,* 935 F.2d 1106, 1110 (10th Cir. 1991).

[22] *Miller v. Glanz,* 948 F.2d 1562, 1565 (10th Cir. 1991).

[23] *The Ridge at Red Hawk, LLC v. Schneider,* 493 F.3d 1174, 1177. (10th Cir. 2007) (quoting *Twombly,* 127 S.Ct. at 1969, 1974).

[24] See *Jones v. KP&H LLC,* 2008 WL 2805444, 3 (10th Cir. July 22, 2008) (noting case law has clarified "that the term 'forum selection clause' refers only to 'agreements which clearly confine litigation to specific tribunals,' as opposed to specific venues which may contain multiple acceptable tribunals.") (quoting *SBKC Serv. Corp. v. 1111 Prospect Partners, LP.,* 105 F.3d 578, 581 (10th Cir. 1997)). The Court cites *Jones,* an unpublished case, for its persuasive value. *Id.* at 3 n.4.

[25] *Breman v. Zapata,* 407 U.S. 1, 11-12 (1972).

[26] *Milk 'N'More, Inc. v. Beavert,* 963 F.2d 1342, 1346 (10th Cir. 1992); *Dexter Axle Co. v. Baan USA, Inc.,* 833 N.E.2d 43, (Ind. App. 2005).

[27] *Energy Solutions, Inc. v. Conn. Yankee Atomic Power Co.,* 2007 U.S. Dist. LEXIS 30973, at *3, No. 2:06-CV-951 TS (D. Utah, April 26, 2007).

[28] *Jones,* 2008 WL 280544, 3 (citing *Yavuz v. 61 MM, Ltd.,* 465 F.3d 418, 427-28 (10th Cir. 2006)).

[29] 833 N.E.2d 43 (Ind. Ct. App. 2005) (citing *Am. Patriot Ins. Agency, Inc. v. Mut. RiskMgmt, Ltd.,* 364 F.3d 884 (7th Cir. 2004)).

[30] *Id.* at 50 (quoting *Am. Patriot Ins.,* 364 F.3d at 889) (internal citations omitted).

[31] Pls' Mem.at10.

[32] Complaint, ¶ ¶ 32,39, 41.

[33] *Id.* At ¶ ¶ 39 and 41, Termination Agreement, at ¶ 4.

[34] *Id.* at ¶ 39 (alleging that in the time frame after the alleged oral agreement, the LOI, "precluded the hiring of the sales professionals" and Stoneware insisted that the parties terminate the LOI in order to achieve Stoneware's objectives).

[35] *Id.* (citing Omron Healthcare, 28 F.3d at 603 for its holding that "all disputes the resolution of which arguably depend on the construction of an agreement arise out of that agreement for purposes of . . . a forum selection clause").

[36] 2007 U.S. Dist. LEXIS 33550 (D. Utah May 7, 2007).

[37] 2007 U.S. Dist. LEXIS 30973 (D. Utah April 26, 2007).

[38] *Id.* at *3.

[39] ***Id.***

[40] *Frietsch v. Refco, Inc.,* 56 F.3d 825, 827-28 (7th Cir. 1995) (allowing Defendant brokerage firm to invoke choice of forum clause enforcing in investment contract between foreign investors and trustees of investment pool); *Hugel v. The Corp. of Lloyd's,* 999 F.2d 206, 209-10 (7th Cir. 1993) (allowing defendant signatory of contract with venue selection clause to enforce it against signatory plaintiff, as well as two non-signatory plaintiff corporations owned and controlled by signatory plaintiff); *Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.,* 709 F.2d 190, 203 (3d Cir. 1983), *rev'd on other grounds* (apply forum selection clause to third party beneficiary); *see also Hasler Aviation, L.L.C. v. Aircenter, Inc.* 2007 WL 2463283, 6 (E.D. Tenn. 2007) (holding that foreseeable non-signatory of the forum selection clause may enforce it or have it enforced against them).

[41] *Hugel,* 999 F.2d at 209. *But see Id.* at 210 n.7 (noting that third-party beneficiary status is not required if requirements otherwise met).

[42] Complaint at ¶ 32.

[43] *Hugel,* 999 F.2d at 209-10 and n.7.

[44] *Hospah Coal Co. v. Chaco Energy Co.,* 673 F.2d 1161, 1163 (10th Cir. 1982).

[45] *See Agridyne Technologies, Inc. v. W.R. Grace & Co.-Conn.,* 863 F.Supp. 1522, 1526 and n.3 (D. Utah 1994) (noting that the non-exclusive list comprising the sound reason exception "may be the convenience and availability of witnesses, or absence of jurisdiction over all necessary or desirable parties, or the possibility of consolidation with related litigation, or considerations relating to the real party in interest") (quoting *Genentech, Inc. v. Eli Lilly & Co,* 998 F.2d 931, 938 (Fed. Cir. 1993), *overruled on other grounds, Wilton v. Seven Falls, Co.,* 515 U.S. 277 (1995)) (enforcing forum selection clause against third-party beneficiary of contract).

[46] *Kenray, Inc. v. Judson Atkinson Candies, Inc.*, 2002 WL 2012439, *3 (S.D. Ill. 2002) (quoting *Publicis Communication v. True N. Communications Inc.*, 132 F.3d 363 (7th Cir. 1997)).

[47] *Id.*

[48] *Sokkia Credit Corp. v. Bush*, 147 F.Supp. 2d 1101, 1105-06 (D. Kan. 2001) (citing *Publicis Comm'n*, 132 F.3d at 365).

[49] See, e.g. Docket No. 9-6 (Complaint in Indiana Case) ¶¶ 16 and 24.
